

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BERNADEAN RITTMANN, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., *et al.*,

Defendants.

Consolidated Action  
Case No. C16-1554 JCC

**DEFENDANTS' RENEWED MOTION  
TO COMPEL ARBITRATION**

**NOTE ON MOTION CALENDAR:  
January 13, 2023**

## TABLE OF CONTENTS

		<b>Page</b>
1		
2		
3	I. INTRODUCTION .....	1
4	II. BACKGROUND .....	2
5	A. The Amazon Flex program and TOS.....	2
6	B. Procedural history. ....	4
7	III. ARGUMENT .....	6
8	A. The Arbitration Plaintiffs agreed to arbitrate these disputes. ....	6
9	B. The FAA requires enforcing the Arbitration Plaintiffs’ agreements. ....	7
10	1. Plaintiffs are not exempt from the FAA under <i>Saxon</i> ’s framework. ....	8
11	a. Plaintiffs belong to the class of local delivery drivers. ....	8
12	b. Local delivery drivers are not directly involved in	
13	transporting goods across borders.....	10
14	2. The prior arbitration decisions in this case are no longer valid after	
15	<i>Saxon</i> .....	13
16	a. <i>Saxon</i> forecloses focusing on Amazon’s business	
17	operations. ....	14
18	b. <i>Saxon</i> adopts a narrower definition of engaging in interstate	
19	commerce. ....	16
20	3. Many Plaintiffs are non-exempt even under the <i>Rittmann</i>	
21	decisions.....	18
22	a. The class of California Amazon Flex drivers do not	
23	frequently perform last legs of interstate shipments. ....	19
24	b. Many Arbitration Plaintiffs never, or almost never, signed	
25	up for delivery blocks involving brown-box orders. ....	20
26	4. The FAA requires arbitration of Plaintiffs’ PAGA claims. ....	21
	C. State law requires enforcing the Arbitration Plaintiffs’ agreements.....	24
	1. Arbitration Plaintiffs who accepted post-2019 TOS versions must	
	arbitrate under Delaware law. ....	26
	a. Arbitration Plaintiffs who signed up after October 2, 2019	
	selected Delaware law and accepted a delegation provision. ....	27
	b. Arbitration Plaintiffs who clicked acceptance to Version 12	
	selected Delaware law and accepted a delegation provision. ....	29

**TABLE OF CONTENTS**  
(continued)

		<b>Page</b>
3	c. Arbitration Plaintiffs who continued delivering after	
4	October 2019 accepted a TOS modification selecting	
	Delaware law. ....	30
5	2. Even without an express selection of Delaware law, Arbitration	
6	Plaintiffs must arbitrate under the laws of the states with the most	
	significant relationship to their contracts. ....	31
7	IV. CONCLUSION.....	40
8	CERTIFICATE OF SERVICE .....	42

**TABLE OF AUTHORITIES****Page(s)****Cases**

<i>Abram v. C.R. Eng., Inc.</i> , No. 20-cv-764, 2020 WL 5077373 (C.D. Cal. June 23, 2020).....	26, 40
<i>Adams v. Parts Distribution Xpress, Inc.</i> , No. 2:20-CV-00697-JMG, 2021 WL 1088231 (E.D. Pa. Mar. 22, 2021) .....	39
<i>Amazon.com, Inc. v. Rittmann</i> , 141 S. Ct. 1374 (2021).....	5
<i>Arafa v. Health Express Corp.</i> , 233 A.3d 495 (N.J. 2020).....	33, 37
<i>Atwood v. Rent-A-Ctr. E., Inc.</i> , No. 15-CV-1023-MJR-SCW, 2016 WL 2766656 (S.D. Ill. May 13, 2016) .....	33, 36
<i>Baffin Land Corp. v. Monticello Motor Inn, Inc.</i> , 425 P.2d 623 (Wash. 1967).....	34
<i>Bd. of Educ. of Bloomfield Cent. Sch. Dist. v. Christa Constr., Inc.</i> , 608 N.E.2d 755 (N.Y. 1992).....	38
<i>Bean v. ES Partners, Inc.</i> , 533 F. Supp. 3d 1226 (S.D. Fla. 2021) .....	13, 19
<i>Benton v. Vanderbilt Univ.</i> , 137 S.W.3d 614 (Tenn. 2004).....	40
<i>Brennan v. Opus Bank</i> , 796 F.3d 1125 (9th Cir. 2015) .....	28, 29
<i>Burgos v. Ne. Logistics, Inc.</i> , No. 15CV6840CBACLP, 2017 WL 10187756 (E.D.N.Y. Mar. 30, 2017).....	38
<i>Butler v. ATS Inc.</i> , No. 20-CV-1631, 2021 WL 1382378 (D. Minn. Apr. 13, 2021).....	37
<i>Callahan v. Paychex N. Am. Inc.</i> , No. 21-CV-05670-CRB, 2022 WL 11902205 (N.D. Cal. Oct. 20, 2022) .....	24

**TABLE OF AUTHORITIES**

(continued)

**Page(s)**

1		
2		
3	<i>Capriole v. Uber Techs., Inc.</i> ,	
4	7 F.4th 854 (9th Cir. 2021) .....	15, 20
5	<i>Carder v. Carl M. Freeman Communities, LLC</i> ,	
6	No. CIV.A. 3319-VCP, 2009 WL 106510 (Del. Ch. Jan. 5, 2009) .....	28, 29
7	<i>Carmona v. Domino's Pizza, LLC</i> ,	
8	21 F.4th 627 (9th Cir. 2021) .....	14, 15
9	<i>Castro v. TCA Logistics Corp.</i> ,	
10	No. 20-CV-2004(JS)(ARL), 2021 WL 7287305 (E.D.N.Y. Mar. 31, 2021) .....	38
11	<i>Cent. Fla. Invs., Inc. v. Parkwest Assocs.</i> ,	
12	40 P.3d 599 (Utah 2002) .....	40
13	<i>Chappel v. Lab'y Corp. of Am.</i> ,	
14	232 F.3d 719 (9th Cir. 2000) .....	24
15	<i>Chiron Corp. v. Ortho Diagnostic Sys., Inc.</i> ,	
16	207 F.3d 1126 (9th Cir. 2000) .....	6
17	<i>Pima County ex rel. City of Tucson v. Maya Constr. Co.</i> ,	
18	761 P.2d 1055 (Ariz. 1988) .....	35
19	<i>D.C. Pub. Emp. Rels. Bd. v. Fraternal Ord. of Police</i> ,	
20	987 A.2d 1205 (D.C. 2010) .....	36
21	<i>Davis v. EGL Eagle Glob. Logistics L.P.</i> ,	
22	243 F. App'x 39 (5th Cir. 2007) .....	40
23	<i>Dean Witter Reynolds, Inc. v. Byrd</i> ,	
24	470 U.S. 213 (1985) .....	7
25	<i>Diamond Match Co. v. Vill. of Ontonagon</i> ,	
26	188 U.S. 82 (1903) .....	17
	<i>Domino's Pizza, LLC v. Carmona</i> ,	
	143 S. Ct. 361 (2022) .....	13, 14
	<i>Epic Sys. Corp. v. Lewis</i> ,	
	138 S. Ct. 1612 (2018) .....	7

**TABLE OF AUTHORITIES**

(continued)

**Page(s)**

<i>In re Facebook Biometric Info. Privacy Litig.</i> , 185 F. Supp. 3d 1155 (N.D. Cal. 2016) .....	30
<i>Fastuca v. L.W. Molnar &amp; Assocs.</i> , 10 A.3d 1230 (Pa. 2011) .....	39
<i>Fed. Ins. Co. v. Superior Court</i> , 60 Cal. App. 4th 1370 (1998) .....	24
<i>First Options of Chi., Inc. v. Kaplan</i> , 514 U.S. 938 (1995) .....	6
<i>Forest Oil Corp. v. McAllen</i> , 268 S.W.3d 51 (Tex. 2008) .....	40
<i>Franco v. Arakelian Enters., Inc.</i> , 234 Cal. App. 4th 947 (2015) .....	24
<i>Gardensensor, Inc. v. Stanley Black &amp; Decker, Inc.</i> , No. 12-CV-03922 NC, 2012 WL 12925714 (N.D. Cal. Oct. 25, 2012) .....	31
<i>Graham v. State Farm Mut. Auto. Ins. Co.</i> , 565 A.2d 908 (Del. 1989) .....	26
<i>Green v. U.S. Xpress Enters., Inc.</i> , 434 F. Supp. 3d 633 (E.D. Tenn. 2020) .....	40
<i>In re Grice</i> , 974 F.3d 950 (9th Cir. 2020) .....	15
<i>Guidice v. Sage Corp.</i> , No. 06-80659-CIV, 2006 WL 8433427 (S.D. Fla. Nov. 6, 2006) .....	36
<i>Haider v. Lyft, Inc.</i> , No. 20-CV-2997 (AJN), 2021 WL 3475621 (S.D.N.Y. Aug. 6, 2021) .....	27
<i>Harper v. Amazon.com Servs., Inc.</i> , 12 F.4th 287 (3d Cir. 2021) .....	25
<i>Hauenstein v. Softwrap Ltd.</i> , No. C07-0572MJP, 2007 WL 2404624 (W.D. Wash. Aug. 17, 2007) .....	6, 30

**TABLE OF AUTHORITIES**

(continued)

**Page(s)**

<i>Hayes v. Oakridge Home,</i> 908 N.E.2d 408 (Ohio 2009).....	38
<i>ICC v. Detroit, Grand Haven &amp; Milwaukee Ry. Co.,</i> 167 U.S. 633 (1897).....	17, 18
<i>Immediato v. Postmates, Inc.,</i> No. CV 20-12308-RGS, 2021 WL 828381 (D. Mass. Mar. 4, 2021).....	19
<i>Iskanian v. CLS Transportation Los Angeles, LLC,</i> 327 P.3d 129 (Cal. 2014) .....	21, 22
<i>Islam v. Lyft, Inc.,</i> 524 F. Supp. 3d 338 (S.D.N.Y. 2021).....	32, 33, 38
<i>J.A. Walker Co. v. Cambria Corp.,</i> 159 P.3d 126 (Colo. 2007) .....	35
<i>Johnson v. Lowe's Home Centers, LLC,</i> No. 221CV00087TLNJDP, 2022 WL 4387796 (E.D. Cal. Sept. 22, 2022).....	24
<i>Johnston Cnty. v. R.N. Rouse &amp; Co., Inc.,</i> 414 S.E.2d 30 (N.C. 1992).....	38
<i>Jorgensen v. Cassiday,</i> 320 F.3d 906 (9th Cir. 2003) .....	34
<i>Kaul v. Mentor Graphics Corp.,</i> 730 F. App'x 437 (9th Cir. 2018) .....	31
<i>Kim v. Reins Int'l Cal., Inc.,</i> 459 P.3d 1123 (Cal. 2020) .....	22
<i>Klaxon Co. v. Stentor Elec. Mfg. Co.,</i> 313 U.S. 487 (1941).....	25
<i>Lamps Plus, Inc. v. Varela,</i> 139 S. Ct. 1407 (2019).....	23
<i>Lopez v. Cintas Corp.,</i> 47 F.4th 428 (5th Cir. 2022) .....	<i>passim</i>

**TABLE OF AUTHORITIES**

(continued)

**Page(s)**

<i>Maldonado v. Sys. Servs. of Am., Inc.</i> , No. SACV09542JVSBNBX, 2009 WL 10675793 (C.D. Cal. June 18, 2009).....	35
<i>Martindale v. Sandvik, Inc.</i> , 800 A.2d 872 (N.J. 2002).....	37
<i>Martinez-Gonzalez v. Elkhorn Packing Co.</i> , No. 18-CV-05226-EMC, 2022 WL 10585178 (N.D. Cal. Oct. 18, 2022) .....	24
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	6
<i>Motsinger v. Lithia Rose-FT, Inc.</i> , 156 P.3d 156 (Or. Ct. App. 2007).....	39
<i>Nedlloyd Lines B.V. v. Superior Ct.</i> , 834 P.2d 1148 (Cal. 1992) .....	25, 31
<i>Nelson v. Gobrandts, Inc.</i> , No. 20-CV-5424-JMY, 2021 WL 4262325 (E.D. Pa. Sept. 20, 2021).....	33, 39
<i>O'Shea v. Maplebear Inc.</i> , 508 F. Supp. 3d 279 (N.D. Ill. 2020) .....	13, 19
<i>Osborn ex rel. Osborn v. Kemp</i> , 991 A.2d 1153 (Del. 2010) .....	6
<i>New York ex rel. Pa. R.R. Co. v. Knight</i> , 192 U.S. 21 (1904).....	17, 18
<i>Palcko v. Airborne Express, Inc.</i> , 372 F.3d 588 (3d Cir. 2004).....	26
<i>Parker v. New Prime, Inc.</i> , No. LACV2003298DOCAGR, 2020 WL 6143596 (C.D. Cal. June 9, 2020) .....	29
<i>Phoenix Ins. Co. v. Rosen</i> , 949 N.E.2d 639 (Ill. 2011) .....	36
<i>Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC</i> , 282 P.3d 1217 (Cal. 2012) .....	6



**TABLE OF AUTHORITIES**

(continued)

**Page(s)**

<i>Powell v. Carey Int'l, Inc.,</i> No. 05-21395-CIV, 2006 WL 8434352 (S.D. Fla. Nov. 17, 2006) .....	36
<i>Radcliff v. San Diego Gas &amp; Elec. Co.,</i> No. 20-CV-1555-H-MSB, 2022 WL 4229305 (S.D. Cal. Sept. 12, 2022).....	24
<i>Ratajesak v. New Prime, Inc.,</i> No. SACV189396DOCAGRX, 2019 WL 1771659 (C.D. Cal. Mar. 20, 2019).....	29
<i>Rittmann v. Amazon.com, Inc.,</i> 383 F. Supp. 3d 1196 (W.D. Wash. 2019), <i>aff'd</i> , 971 F.3d 904 (9th Cir. 2020) .....	<i>passim</i>
<i>Rittmann v. Amazon.com, Inc.,</i> 971 F.3d 904 (9th Cir. 2020) .....	<i>passim</i>
<i>Roberts v. Cent. Refrigerated Serv.,</i> 27 F. Supp. 3d 1256 (D. Utah 2014).....	40
<i>Romero v. Watkins &amp; Shepard Trucking, Inc.,</i> No. 20-55768, 2021 WL 3675074 (9th Cir. Aug. 19, 2021) .....	24, 25, 26, 31
<i>Ross v. Subcontracting Concepts, LLC,</i> No. CV 20-12994, 2021 WL 6072593 (E.D. Mich. Dec. 23, 2021).....	12, 19
<i>SBC Interactive, Inc. v. Corp. Media Partners,</i> 714 A.2d 758 (Del. 1999) .....	27
<i>Schmidt v. Midwest Fam. Mut. Ins. Co.,</i> 426 N.W.2d 870 (Minn. 1988).....	37
<i>Schnall v. AT &amp; T Wireless Servs., Inc.,</i> 259 P.3d 129 (Wash. 2011).....	25
<i>Shanghai Com. Bank Ltd. v. Chang,</i> 404 P.3d 62 (Wash. 2017).....	25, 31, 34
<i>Shanks v. Swift Transp. Co. Inc.,</i> No. CIV.A. L-07-55, 2008 WL 2513056 (S.D. Tex. June 19, 2008) .....	40
<i>Shotts v. OP Winter Haven, Inc.,</i> 86 So. 3d 456 (Fla. 2011).....	36

**TABLE OF AUTHORITIES**

(continued)

**Page(s)**

<i>Singh v. Uber Techs., Inc.</i> , 571 F. Supp. 3d 345 (D.N.J. 2021) .....	33
<i>Siperavage v. Uber Techs., Inc.</i> , No. CV 20-12265, 2021 WL 2680060 (D.N.J. June 30, 2021) .....	37
<i>Sprinkle v. Gen. Dynamics Land Sys.</i> , No. C09-1672Z, 2010 WL 1330328 (W.D. Wash. Mar. 30, 2010) .....	6
<i>St. Fleur v. WPI Cable Sys./Mutron</i> , 879 N.E.2d 27 (Mass. 2008) .....	37
<i>Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.</i> , 14 Cal. App. 4th 637 (1993) .....	25
<i>Sw. Airlines Co. v. Saxon</i> , 142 S. Ct. 1783 (2022) .....	<i>passim</i>
<i>Vandenberg v. Superior Ct.</i> , 982 P.2d 229 (Cal. 1999) .....	35
<i>Vargas v. Delivery Outsourcing, LLC</i> , No. 15-cv-3408, 2016 WL 946112 (N.D. Cal. Mar. 14, 2016) .....	7
<i>Viking River Cruises, Inc. v. Moriana</i> , 142 S. Ct. 1906 (2022) .....	21, 22, 23, 24
<i>Viking River Cruises, Inc. v. Moriana</i> , Dkt. # 193 .....	<i>passim</i>
<i>W.L. Byers Trucking, Inc. v. Falcon Transp. Co.</i> , No. 2:09CV342JVB, 2010 WL 3724895 (N.D. Ind. Sept. 17, 2010) .....	38
<i>Wagner Constr. Co. v. Pac. Mech. Corp.</i> , 41 Cal. 4th 19 (2007) .....	23
<i>Waithaka v. Amazon.com, Inc.</i> , 966 F.3d 10 (1st Cir. 2020) .....	8, 15, 16, 17
<i>Wallace v. Grubhub Holdings</i> , 970 F.3d 798 (7th Cir. 2020) .....	12

**TABLE OF AUTHORITIES**

(continued)

**Page(s)**

*Webber v. Uber Techs., Inc.*,  
No. 18-cv-2941, 2018 WL 10151934 (C.D. Cal. Sept. 5, 2018) .....30

*Young v. Shipt, Inc.*,  
563 F. Supp. 3d 832 (N.D. Ill. 2021) .....13

*Ziegler v. JP Morgan Chase Bank, N.A.*,  
No. 2:20-CV-00298-SAB, 2021 WL 6274448 (E.D. Wash. Feb. 24, 2021) .....31

**Statutes**

42 PA. CONS. STAT. § 7303 .....39

9 U.S.C. §§ 1-4 ..... *passim*

29 U.S.C. § 216(b) .....6

ARIZ. REV. STAT. ANN. § 12-3006(A).....35

Arizona Revised Uniform Arbitration Act .....35

CAL. CIV. PROC. CODE § 1281.....35

California Arbitration Act.....35

California’s Private Attorneys General Act..... *passim*

COLO. REV. STAT. § 13-22-206(1) .....35

Colorado Uniform Arbitration Act .....35

D.C. CODE § 16-4406(a) .....36

D.C. Revised Uniform Arbitration Act.....36

DEL. CODE tit. 10, § 5703 .....27

Delaware Uniform Arbitration Act.....26, 27

Fair Labor Standards Act .....4, 5, 6

Federal Arbitration Act..... *passim*

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
FLA. STAT. § 682.02(1) .....	36
ILL. COMP. STAT. ANN. 5/1 .....	36
Illinois Uniform Arbitration Act.....	36
Interstate Commerce Act of 1887 .....	17
MASS. GEN. LAWS ch. 251, § 1 .....	37
Massachusetts Uniform Arbitration Act .....	37
MINN. STAT. § 572B.06(a) .....	37
Minnesota Revised Uniform Arbitration Act .....	37
N.C. GEN. STAT. ANN. § 1-569.6 .....	38
N.J. STAT. ANN. § 2A:23B-6(a) .....	37
New Jersey Arbitration Act .....	33, 37
North Carolina Revised Uniform Arbitration Act .....	38
Ohio Arbitration Act.....	38
OHIO REV. CODE ANN. § 2711.01(A).....	38
OR. REV. STAT. § 36.620(1) .....	39
Oregon Uniform Arbitration Act .....	39
Pennsylvania Uniform Arbitration Act.....	39
TENN. CODE ANN. § 29-5-302(a) .....	39
Tennessee Uniform Arbitration Act.....	39
TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a).....	40
Texas Arbitration Act .....	40
UTAH CODE ANN. § 78B-11-107(1).....	40

**TABLE OF AUTHORITIES**  
(continued)

**Page(s)**

Utah Uniform Arbitration Act .....	40
<b>Other Authorities</b>	
AM. ARB. ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-7(a), at 13 (2016) .....	28
N.Y. C.P.L.R. 7501 .....	38
RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186–88 (1971) .....	<i>passim</i>

1 **I. INTRODUCTION**

2 Plaintiffs contend that they can litigate in court because their agreements to arbitrate  
 3 supposedly fall within the Federal Arbitration Act (“FAA”) exemption for certain “class[es] of  
 4 workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1. Although this Court originally  
 5 adopted that view, which the Ninth Circuit affirmed, the Supreme Court has since set forth a new  
 6 framework for the FAA exemption in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022).  
 7 *Saxon* compels a reassessment of those earlier rulings and the enforcement of Plaintiffs’ arbitration  
 8 agreements. The Supreme Court’s ruling makes clear that the exemption depends on whether the  
 9 relevant class of workers, based on the workers’ own actual work activities, is “*directly involved*  
 10 in transporting goods *across state or international borders*.” *Id.* at 1788-89 (emphasis added). As  
 11 drivers who make local deliveries, Plaintiffs are not so “directly involved.”

12 Indeed, the only circuit-court decision to decide the issue since *Saxon* correctly holds that  
 13 local delivery drivers—even ones who prefer the label “last-mile driver”—do not qualify as  
 14 exempt under *Saxon*’s framework. *Lopez v. Cintas Corp.*, 47 F.4th 428, 431 (5th Cir. 2022). Local  
 15 drivers who “take items from a local warehouse to local customers . . . are not so ‘engaged’ in  
 16 ‘interstate commerce’ as § 1 contemplates.” *Id.* at 432. That is true even if the items picked up at  
 17 the local warehouse have been “shipped from out of state.” *Id.* at 430. Even then, local drivers do  
 18 not have the “‘direct and necessary role’ in the transportation of goods across borders” that *Saxon*  
 19 requires, and are not “actively engaged in transportation of those goods across borders.” *Id.* at 433  
 20 (quoting *Saxon*, 142 S. Ct. at 1790). *Saxon* instructs courts to base the exemption on the work  
 21 “actually” performed by the relevant class of workers. *Lopez*, 47 F.4th at 433; *see Saxon*, 142 S.  
 22 Ct. at 1788. And through that lens, “[o]nce the goods arrived at [an in-state] warehouse and were  
 23 unloaded, anyone interacting with those goods was no longer engaged in interstate commerce.”  
 24 *Lopez*, 47 F.4th at 433. Amazon’s broader interstate operations are irrelevant under *Saxon*.

25 But even if the prior decisions in this case were good law after *Saxon*, many Plaintiffs still  
 26 would have to arbitrate. To start, many do not qualify as exempt under those decisions because

1 they almost always delivered goods stocked in the same state as the customer. So even if it were  
 2 relevant to the exemption whether items were located outside the customer's state at the time of  
 3 the order, such facts would not matter for the Plaintiffs who did not typically deliver such items.

4 In addition, state law requires enforcing Plaintiffs' arbitration agreements even assuming  
 5 the FAA does not. Several dozen Plaintiffs accepted new versions of the Amazon Flex Independent  
 6 Contractor Terms of Service ("TOS") that did not exist when this Court issued its earlier ruling.  
 7 And unlike the TOS before the Court previously, the new versions specify that Delaware law  
 8 governs their arbitration provisions if the FAA is inapplicable. Plaintiffs cannot identify any valid  
 9 reason under Delaware law not to enforce those arbitration agreements. For the remaining  
 10 Plaintiffs who agreed only to earlier versions, those agreements' arbitration clauses remain binding  
 11 contractual commitments and, under normal conflict-of-laws rules, are enforceable under the laws  
 12 of the states with the most significant relationship to the contracts. For all these reasons, the Court  
 13 should compel arbitration as to all Plaintiffs who did not opt out of the TOS arbitration provision.

## 14 **II. BACKGROUND**

### 15 **A. The Amazon Flex program and TOS.**

16 Amazon.com, Inc. and affiliates sell products through different channels, including the  
 17 Amazon.com website, mobile applications, and retail locations like Whole Foods Market. *See*  
 18 Declaration of Sarah Wilson ("Wilson Decl."), ¶¶ 5-6. Amazon Logistics, Inc. contracts with,  
 19 among other third-party contractors, individual independent contractor "Delivery Partners" like  
 20 Plaintiffs through a smartphone application-based program called Amazon Flex. *Id.* ¶¶ 7-8, 12, 21.  
 21 Delivery Partners use their personal vehicles to make local deliveries of groceries, food, and other  
 22 goods to Amazon's customers. *Id.* ¶¶ 12-15, 17, 20. To sign up, prospective Delivery Partners must  
 23 download the Amazon Flex app, create an account, select the local area in which they wish to  
 24 make deliveries, and accept the Amazon Flex TOS then in effect by clicking an acceptance button  
 25 in the Amazon Flex app. *Id.* ¶¶ 21-22, 31-.

26 Numerous versions of the TOS have governed at various times since the Amazon Flex

1 program began in 2015. *Id.* ¶ 22. Seven versions, which Amazon internally designates Versions 6  
 2 through 12, have been in effect through the Amazon Flex app during the named and opt-in  
 3 Plaintiffs' collective participation in the Amazon Flex program, as shown below:

TOS Version	Start Date
6	September 28, 2015
7	April 25, 2016
8	August 11, 2016
9	September 21, 2016
10	February 24, 2017
11	October 2, 2019
12	March 31, 2021

4  
 5  
 6  
 7  
 8  
 9 *Id.* ¶¶ 23-29; *see id.* Ex. A-G.

10 Each of these TOS versions includes a modification provision through which the  
 11 contracting parties agreed (1) that Amazon could modify the TOS from time to time by providing  
 12 notice to the Delivery Partner and (2) that the Delivery Partner would be bound by the modification  
 13 if the Delivery Partner continued to perform deliveries after receiving notice. TOS v.6-v.8 § 14;  
 14 TOS v.9-v.12 § 13. In accordance with these provisions, Amazon periodically sent emails to  
 15 existing Amazon Flex Delivery Partners when it updated the TOS to a new version. After Version  
 16 11 went into effect in 2019 and Version 12 went into effect in 2021, Amazon emailed existing  
 17 Delivery Partners to notify them of the TOS updates and remind them how to access the TOS  
 18 within the app. Wilson Decl. ¶¶ 154-56 & Exs. H-I. Separately, Delivery Partners within the state  
 19 of California who had active accounts received a notification in the Amazon Flex app when  
 20 Version 12 went into effect in 2021, requiring them to read and accept the new agreement to  
 21 continue performing deliveries. *Id.* ¶¶ 138-39. As with the original signup process, these California  
 22 Delivery Partners saw the complete agreement and, after scrolling through it, had to click a button  
 23 saying that they agreed to and accepted the Version 12 terms. *See id.*

24 All relevant versions contain a mutual agreement to arbitrate covered disputes and claims  
 25 on an individual basis. The covered disputes and claims include any dispute or claim in any way  
 26 related to the TOS, the Delivery Partner's participation in the Amazon Flex program, or the



1 Delivery Partner's performance of services through the program. TOS v.6-v.8 § 12; TOS v.9-v.12  
 2 § 11(a). Versions 9 and 10, however, included an opt-out mechanism whereby Delivery Partners  
 3 could choose to reject the arbitration provision in those agreements by simply sending an email to  
 4 an address provided in the TOS within a 14-day window. TOS v.9-v.10 § 11(k). Nine Plaintiffs  
 5 opted out of the arbitration provision through this mechanism, Wilson Decl. ¶¶ 136-37, and  
 6 Amazon does not seek to compel their claims to arbitration.

7 A severability provision in each TOS stated, "If any provision of [this TOS] is determined  
 8 to be unenforceable, the parties intend that [this TOS] be enforced as if the unenforceable  
 9 provisions were not present and that any partially valid and enforceable provisions be enforced to  
 10 the fullest extent permissible under applicable law." TOS v.6-v.8 § 16; TOS v.9-v.12 § 16(a).

11 Another relevant provision is the choice-of-law provision, which varied over time.  
 12 Versions 6 through 10 generally selected Washington state law but specified that the arbitration  
 13 provisions were governed by the FAA and applicable federal law. TOS v.6-v.8 § 13; TOS v.9-v.10  
 14 § 12. Versions 11 and 12, on the other hand, generally selected Delaware law, continued to specify  
 15 that their arbitration provisions were governed by the FAA and applicable federal law, and further  
 16 made clear that, "If, for any reason, the Federal Arbitration Act is held by a court of competent  
 17 jurisdiction not to apply to [the arbitration provision], the law of the state of Delaware [] will  
 18 govern [the arbitration provision]." TOS v.11-v.12 § 12.

## 19 **B. Procedural history.**

20 Plaintiffs Bernadean Rittmann, Freddie Carroll, and Julia Wehmeyer began this action in  
 21 2016, alleging that Amazon misclassified Amazon Flex Delivery Partners as independent  
 22 contractors rather than employees, in purported violation of the Fair Labor Standards Act  
 23 ("FLSA") and Washington and Seattle wage-and-hour laws. Dkt. # 1. A couple months later, the  
 24 First Amended Complaint added Raef Lawson as a named Plaintiff and added California claims.  
 25 Dkt. # 33. Amazon promptly moved to dismiss and simultaneously moved to compel Lawson to  
 26 arbitrate because he—unlike Rittmann, Carroll, and Wehmeyer—had not opted out of the TOS

1 arbitration provisions. *See* Dkt. # 36. The Court dismissed nearly all of Plaintiffs’ claims without  
 2 prejudice and deferred consideration of the motion to compel arbitration. *See* Dkt. # 76. On March  
 3 22, 2017, with Amazon’s motion to compel arbitration still pending, this Court stayed proceedings.  
 4 *See* Dkt. # 77. That stay remained in place while the Supreme Court and Ninth Circuit entertained  
 5 a series of cases bearing on Amazon’s motion to compel arbitration. *See* Dkt. # 98. In 2019, at the  
 6 parties’ joint request, the Court partially lifted the stay for the limited purpose of resolving the  
 7 motion to compel arbitration. Dkt. # 101.

8 On April 23, 2019, this Court issued an order denying Amazon’s motion to compel  
 9 arbitration. Dkt. # 115; *see Rittmann v. Amazon.com, Inc. (Rittmann I)*, 383 F. Supp. 3d 1196, 1202  
 10 (W.D. Wash. 2019), *aff’d*, 971 F.3d 904 (9th Cir. 2020). Analyzing Version 9 of the TOS and its  
 11 predecessor (Versions 6-8 are identical in relevant respects), this Court determined that the TOS  
 12 was exempt from the FAA and unenforceable under Washington law. Dkt. # 115 at 2-9. The Court  
 13 maintained the existing stay of litigation pending Amazon’s appeal. Dkt. # 133. On appeal, the  
 14 Ninth Circuit affirmed this Court’s denial of Amazon’s motion to compel arbitration. *Rittmann v.*  
 15 *Amazon.com, Inc. (Rittmann II)*, 971 F.3d 904 (9th Cir. 2020). The Supreme Court later denied  
 16 Amazon’s petition for a writ of certiorari. *Amazon.com, Inc. v. Rittmann*, 141 S. Ct. 1374 (2021).

17 After the denial of Amazon’s cert petition, Plaintiff Iain Mack—whose action under  
 18 California’s Private Attorneys General Act (“PAGA”) had been consolidated with this action, *see*  
 19 Dkt. # 87—moved to lift the stay. This Court denied that motion, finding that continuation of the  
 20 stay was warranted by two pending Supreme Court cases: *Southwest Airlines Co. v. Saxon* and  
 21 *Viking River Cruises, Inc. v. Moriana*. Dkt. # 193. After the decisions in those two cases, the Court  
 22 lifted the stay and set various case deadlines, including for this Renewed Motion to Compel  
 23 Arbitration. Dkt. ## 226, 237.

24 On November 14, 2022, 19 named Plaintiffs filed a Consolidated Fourth Amended  
 25 Complaint. Dkt. # 238. They assert wage-and-hour claims under the Fair Labor Standards Act  
 26 (“FLSA”), statutory claims under the laws of Washington, Seattle, California, Illinois, New York,

1 New Jersey law, and common law claims under the laws of various states. *Id.* ¶¶ 123-202.

2 Moreover, an additional 83 opt-in Plaintiffs have filed in consent forms under the FLSA.  
 3 *See* Dkt. ## 19, 63, 81, 84, 85, 89, 90, 91, 92, 93, 102, 135, 138, 139, 150, 151, 152, 153, 154, 163,  
 4 168, 180, 202; *cf.* 29 U.S.C. § 216(b). As noted, 9 of the 102 named and opt-in Plaintiffs opted out  
 5 of arbitration according to Amazon’s records. Wilson Decl. ¶ 136. This Renewed Motion seeks to  
 6 compel arbitration of the remaining 93, whom this filing refers to as the “Arbitration Plaintiffs”  
 7 and who are listed in Appendix A to the concurrently filed Wilson Declaration.

### 8 **III. ARGUMENT**

#### 9 **A. The Arbitration Plaintiffs agreed to arbitrate these disputes.**

10 “[T]he first task of a court asked to compel arbitration of a dispute is to determine whether  
 11 the parties agreed to arbitrate that dispute.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*  
 12 *Inc.*, 473 U.S. 614, 626 (1985); *see Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126,  
 13 1130 (9th Cir. 2000). To do so, courts “apply ordinary state-law principles that govern the  
 14 formation of contracts.” *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Basic  
 15 contract-law principles require offer, acceptance, and consideration. *See, e.g., Sprinkle v. Gen.*  
 16 *Dynamics Land Sys.*, No. C09-1672Z, 2010 WL 1330328, at \*4 (W.D. Wash. Mar. 30, 2010);  
 17 *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010); *Pinnacle Museum Tower Ass’n*  
 18 *v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1224 (Cal. 2012).

19 To sign up and become eligible to perform Amazon Flex deliveries, all Plaintiffs agreed to  
 20 the TOS version in effect at the time of signup by clicking the acceptance button in the Amazon  
 21 Flex app. Wilson Decl. ¶¶ 30-33; *see, e.g., Hauenstein v. Softwrap Ltd.*, No. C07-0572MJP, 2007  
 22 WL 2404624, at \*3 (W.D. Wash. Aug. 17, 2007) (“[C]ourts have held that ‘clicking’ agreement  
 23 to the terms of a contract is an ‘assent’ for purposes of contract analysis.”).

24 Versions 9 and 10 (in effect between September 21, 2016 and October 2, 2019) gave drivers  
 25 the ability to opt out of the TOS arbitration provision by sending an email to a specified email  
 26 address during a specified opt-out period. TOS v.9-v.10 § 11(k). The 93 Arbitration Plaintiffs at

1 issue in this motion either chose not to opt out of arbitration through this mechanism or signed up  
 2 under later versions of the TOS. Wilson Decl. ¶ 137 & Appx. A. They accordingly agreed to  
 3 arbitration all their Amazon Flex-related disputes. *See* TOS v.6-v.8 § 12; TOS v.9-v.12 § 11(a).

4 **B. The FAA requires enforcing the Arbitration Plaintiffs’ agreements.**

5 The FAA requires courts to rigorously enforce FAA-governed arbitration agreements  
 6 according to their terms, including by compelling arbitration and either staying (or dismissing)  
 7 litigation. 9 U.S.C. §§ 3-4; *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018); *Dean Witter*  
 8 *Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). The contracting parties selected the FAA to  
 9 govern their arbitration agreements. *See* TOS v6-v8 § 13; TOS v9-v12 § 12. And the FAA’s basic  
 10 coverage extends to any arbitration agreement in “a contract evidencing a transaction involving  
 11 commerce.” 9 U.S.C. § 2. There is no question that Amazon Flex transactions involve interstate  
 12 commerce and that each TOS therefore triggers the FAA’s basic coverage.

13 Plaintiffs argue, however, that the agreements implicate the FAA’s limited exemption for  
 14 “contracts of employment of seamen, railroad employees, or any other class of workers engaged  
 15 in foreign or interstate commerce.” 9 U.S.C. § 1. The Arbitration Plaintiffs bear “the burden of  
 16 demonstrating the exemption” applies to them. *Vargas v. Delivery Outsourcing, LLC*, No. 15-cv-  
 17 3408, 2016 WL 946112, at \*3 (N.D. Cal. Mar. 14, 2016).

18 The Arbitration Plaintiffs cannot carry their burden under the Supreme Court’s new  
 19 instructions for the exemption. In *Saxon*, the Court “laid out the proper framework for determining  
 20 whether a person falls within the transportation-worker exemption.” *Lopez v. Cintas Corp.*, 47  
 21 F.4th 428, 431 (5th Cir. 2022). This framework prescribes a two-step inquiry. First, a court should  
 22 “begin by defining the relevant ‘class of workers’ to which [the plaintiff] belongs,” and then it  
 23 should “determine whether that class of workers is ‘engaged in foreign or interstate commerce.’”  
 24 *Saxon*, 142 S. Ct. at 1788; *accord Lopez*, 47 F.4th at 431.

25 Under *Saxon*’s two-step framework, the Arbitration Plaintiffs belong to the class of local  
 26 delivery drivers, and this class of workers is not engaged in foreign or interstate commerce. The

Fifth Circuit’s recent *Lopez* decision is squarely on point. There, a self-described “last-mile driver” invoked *Rittmann II* and *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020), to argue that he was exempt from the FAA, even though his deliveries were all within Texas, because he delivered goods that had arrived at the in-state warehouse from outside Texas. *Lopez*, 47 F.4th at 430-32. Although the Fifth Circuit acknowledged that *Rittmann II* and *Waithaka* had held such drivers are exempt, it determined that “after *Saxon*,” the opposite conclusion was required: “local delivery drivers are not so ‘engaged’ in ‘interstate commerce’ as § 1 contemplates.” *Id.* at 432. Even though the goods had originated in other states, “[o]nce the goods arrived at the Houston warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce” under *Saxon*’s test. *Id.* at 433. *Saxon* compels the same conclusion here.

But even if the Fifth Circuit’s reading of *Saxon* were wrong, many Arbitration Plaintiffs still would not be exempt under *Rittmann II*. While *Rittmann II* held that performing the “last leg” of a business’s interstate shipments triggers the exemption, many Arbitration Plaintiffs did not perform such last leg deliveries on a frequent basis. Even under *Rittmann II*, then, these Arbitration Plaintiffs are engaged in purely intrastate activities within the meaning of the FAA and thus are not exempt as detailed below.

**1. Plaintiffs are not exempt from the FAA under *Saxon*’s framework.**

**a. Plaintiffs belong to the class of local delivery drivers.**

At step one of its two-step framework, *Saxon* makes clear how to define the class of workers to which the Arbitration Plaintiffs belong. The *Saxon* plaintiff was a Southwest Airlines “ramp supervisor” who frequently loaded cargo onto outbound aircraft and unloaded cargo from aircraft that had just landed. 142 S. Ct. at 1787-88. She asked the Supreme Court to define the relevant class of workers based on the business of her employer: “airline employees.” *Id.* at 1788 (citation omitted). Southwest, in contrast, argued that the class of workers should be defined “based on *their* conduct, not their *employer’s*.” *Id.* (citation omitted).

The Supreme Court adopted Southwest’s approach for defining the class of workers, and

1 defined the class as “workers who physically load and unload cargo on and off airplanes on a  
 2 frequent basis.” *Id.* at 1789. The Court explained that Section 1, by its terms, centers on “workers”  
 3 and thus on the *work they perform* rather than the *business* that pays them. *Id.* at 1788. Section 1  
 4 also asks how those workers are “engaged,” reinforcing this emphasis on “the actual work that the  
 5 members of the class, as a whole, typically carry out.” *Id.* The *Saxon* plaintiff was “a member of a  
 6 ‘class of workers’ based on what she does at Southwest, not what Southwest does generally.” *Id.*;  
 7 *Lopez*, 47 F.4th at 431 (“Because the FAA ‘speaks of “workers,” not “employees” or “servants,”’  
 8 we determine the relevant ‘class of workers’ by the work that Lopez actually did at Cintas.”).

9         These principles show that the relevant class of workers here is *local delivery drivers*—  
 10 workers who use ordinary vehicles, like their own cars, to deliver customer orders within a local  
 11 area during delivery blocks that typically last between two and six hours. Wilson Decl. ¶¶ 12-17.  
 12 Amazon Flex deliveries include grocery and food items, like orders that drivers pick up from  
 13 Whole Foods Market stores, as well as “brown box” packages that drivers pick up from delivery  
 14 stations. *Id.* ¶¶ 13-15. For a period, Amazon Flex deliveries included some restaurant orders as  
 15 well. *Id.* ¶ 13. Amazon categorizes delivery blocks as “GSF” (“Global Specialty Fulfillment”) or  
 16 “SSD” (“Sub Same-Day”) blocks when they involve locally stocked items like Whole Foods  
 17 groceries, restaurant orders, or merchandise available for same-day delivery, and Amazon  
 18 categorizes delivery blocks as “AMZL” (“Amazon Logistics”) blocks when they involve brown-  
 19 box packages of goods warehoused in Amazon sites known as “fulfillment centers,” which may  
 20 need to travel longer distances after customers purchase them. *Id.* ¶¶ 13-15. But regardless of the  
 21 type of delivery block being performed, the basic work is the same: drivers arrive at the local  
 22 pickup location, place the items in their personal vehicles, and deliver them to nearby customers  
 23 in the same local area. *Id.* ¶ 20.

24         Indeed, even on occasions when an Amazon Flex driver picks up a brown-box package  
 25 that may have traveled across state lines after the customer ordered it, the Amazon Flex driver’s  
 26 own activities are purely local. The Amazon Flex driver does not interact with tractor-trailers,

airplanes, or their drivers and pilots. *Id.* ¶ 19. Rather, several layers of distinct workers and vehicles separate the Amazon Flex driver from the long-distance transportation work. Once a customer purchases an item destined for a brown-box delivery, warehouse associates pick the item from the shelves, move it through the facility using conveyor belts and other means, and package it for the customer. *Id.* ¶ 16. These brown-box packages then go to other associates at the fulfillment center, who load them onto trucks normally destined for a sort center. *Id.* At the sort center, different associates unload these trucks and organize and bundle packages by zip code. *Id.* Sort center associates load the organized packages onto other trucks, which other drivers (not Amazon Flex drivers) drive to delivery stations. *Id.* At the delivery station, various workers there (again not Amazon Flex drivers) unload these trucks, reorganize and rebundle packages for specific batches of local deliveries, and place the batched items onto a cart or into bags. *Id.* ¶ 17. Only then do Amazon Flex drivers pick up these batched brown-box packages, transfer them from the carts or bags into the trunk or backseat of the driver’s car, and head out for a local delivery route. *Id.*

The Arbitration Plaintiffs thus belong to a class of local delivery drivers. Whether an Amazon Flex driver delivers locally stocked items—like Whole Foods groceries, restaurant orders, or same-day merchandise—or delivers brown-box packages of items from Amazon network of fulfillment centers, the work is fundamentally the same. And that work is separated, in time and space, from the interstate journey on long-distance transportation on tractor-trailers and airplanes.

**b. Local delivery drivers are not directly involved in transporting goods across borders.**

At *Saxon* step two, the class of local delivery drivers do not engage in activities that qualify as interstate commerce under the exemption. Analyzing the key statutory terms, the Supreme Court concluded that the exemption encompasses “any class of workers *directly involved* in transporting goods *across state or international borders*.” *Saxon*, 142 S. Ct. at 1789 (emphasis added). That means that exempt workers “must at least play a *direct and necessary* role in the free flow of goods *across borders*” and “be *actively engaged* in transportation of those goods *across borders* via the



1 channels of foreign or interstate commerce.” *Id.* at 1790 (citations and quotation marks omitted).

2 Plaintiffs would have the Court stop reading at “transporting goods”—ignoring the key  
3 phrase “across state or international borders.” But as the Fifth Circuit recently held in *Lopez*, local  
4 delivery drivers “do not have such a ‘direct and necessary role’ in the transportation of goods  
5 across borders.” 47 F.4th at 433. Nor are they “actively engaged in transportation of those goods  
6 across borders.” *Id.* On the contrary, “[o]nce the goods arrived at the [in-state] warehouse and were  
7 unloaded, anyone interacting with those goods was no longer engaged in interstate commerce.” *Id.*

8 These local drivers differ markedly from the transportation workers in *Saxon* because local  
9 drivers lack any direct role in transporting goods across borders. Airplane cargo loaders are  
10 “directly involved in transporting goods across state or international borders” because loading and  
11 unloading interstate vehicles is a direct and integral part of the goods’ travel across state lines.  
12 *Saxon*, 142 S. Ct. at 1789. According to *Saxon*, that cross-border travel begins when cargo is loaded  
13 onto the vehicle “bound for interstate transit” and does not end until the cargo is unloaded from  
14 the same vehicle. *Id.* at 1790. That is because the Supreme Court held long ago that cross-border  
15 transportation remains in progress throughout the processes of loading and unloading the vehicles  
16 that cross state lines. *Id.* at 1789-90 (citing *Baltimore & Ohio Sw. R.R. Co. v. Burtch*, 263 U.S.  
17 540, 544 (1924), and *Erie R.R. Co. v. Shuart*, 250 U.S. 465, 468 (1919)). In contrast, *Saxon*  
18 explicitly “recognize[d]” that the exemption’s application to so-called “last leg” drivers is not “so  
19 plain.” *Id.* at 1789 n.2. Although it noted that *Rittmann II* had held such drivers exempt, the  
20 Supreme Court characterized them as “carr[ying] out duties further removed from the channels of  
21 interstate commerce or the actual crossing of borders” than airplane cargo loaders. *Id.*

22 While the Supreme Court did not need to resolve the status of “last leg” drivers to decide  
23 *Saxon*, applying *Saxon*’s test to such drivers is straightforward—as the Fifth Circuit recently  
24 showed. The “last leg” or “last mile” label does not change the fact that a local driver lacks any  
25 direct or active role in transporting goods across international or state borders. *See Lopez*, 47 F.4th  
26 at 431. By the time an Amazon Flex Delivery Partner in Seattle or San Francisco loads a group of



1 customers' orders into the trunk or backseat of their cars, whatever cross-border transportation  
2 may have occurred has happened with zero involvement by the Amazon Flex driver. *See* Wilson  
3 Decl. ¶¶ 10-20; *cf. Lopez*, 47 F.4th at 432 (“[L]ocal delivery drivers take items from a local  
4 warehouse to local customers; these drivers enter the scene after the goods have already been  
5 delivered across state lines.”). Other classes of workers loaded airplanes and/or tractor-trailers,  
6 piloted or driven them, unloaded them, and sorted and otherwise handled them at in-state sort  
7 centers and delivery stations. Wilson Decl. ¶¶ 16-18. Only after those workers have performed  
8 these discrete functions do the Amazon Flex drivers pick up items batched by others, load the  
9 batches into their cars, and take them short distances to local customers. *Id.* ¶ 17. But by the time  
10 “the goods arrived at the [in-state] warehouse and were unloaded, anyone interacting with those  
11 goods was no longer engaged in interstate commerce.” *Lopez*, 47 F.4th at 433.

12 That conclusion is particularly clear here because the record shows that many Amazon Flex  
13 delivery blocks are to deliver locally stocked items—such as groceries from a Whole Foods Market  
14 store, restaurant orders, or items kept at nearby warehouses capable of fulfilling same-day orders.  
15 Nickerson Decl. ¶¶ 5-7; Wilson Decl. ¶¶ 13-14. Even under *Rittmann II*'s pre-*Saxon* analysis,  
16 deliveries of groceries, restaurant orders, and locally stocked items do not qualify as exempt  
17 transportation because such items are already in the same locale as the customer who orders them.  
18 For example, the Ninth Circuit approved of cases holding that “local food delivery drivers are not  
19 ‘engaged in the interstate transport of goods’” because such drivers do not “complete the journey”  
20 of goods in continuous interstate transportation. *Rittmann II*, 971 F.3d at 916-17 (citation omitted);  
21 *see also Wallace v. Grubhub Holdings*, 970 F.3d 798, 803 (7th Cir. 2020) (holding that restaurant  
22 delivery drivers are not exempt from the FAA). As courts have widely recognized, the same  
23 reasoning applies to delivery drivers who go to other nearby locations—like a grocery store, retail  
24 store, or facility for same-day orders—to pick up and deliver goods stocked in the same locale as  
25 the customer who orders them. *See, e.g., Ross v. Subcontracting Concepts, LLC*, No. CV 20-12994,  
26 2021 WL 6072593, at \*8 (E.D. Mich. Dec. 23, 2021) (finding that *Rittmann II* does not support

1 exempting drivers who deliver items that “have already made their interstate journey and then are  
 2 purchased by consumers from a local retailer”); *Young v. Shipt, Inc.*, 563 F. Supp. 3d 832, 839  
 3 (N.D. Ill. 2021) (concluding that under *Rittmann II*, “[t]he flow in interstate commerce ha[s]  
 4 ceased’ when the goods are delivered to [a] retail store, and the goods ‘have come to a permanent  
 5 rest within the state”); *Bean v. ES Partners, Inc.*, 533 F. Supp. 3d 1226, 1236 (S.D. Fla. 2021)  
 6 (explaining that “same day” delivery drivers who “pick up from local warehouses, merchants, or  
 7 pharmacies, and then deliver to customers within [a state]” are not exempt even under *Rittmann*  
 8 *II*); *O’Shea v. Maplebear Inc.*, 508 F. Supp. 3d 279, 287 (N.D. Ill. 2020) (“[D]rivers who deliver  
 9 food purchased over the internet from a grocery store differ in no material way from drivers who  
 10 pick up food purchased over the web from a restaurant[.]”). In such cases, the goods remain in the  
 11 same local area from when the customers place their orders to when they receive them.

12 Amazon Flex drivers are thus several steps removed from—not “directly involved in” or  
 13 playing a “direct and necessary role in”—“transporting goods across state or international  
 14 borders.” *Saxon*, 142 S. Ct. at 1789 (citation and quotation marks omitted). If customers could not  
 15 rely on the convenience of local delivery, goods would still flow freely across state and national  
 16 borders. Many Amazon customers could obtain the very same products, even if local delivery were  
 17 unavailable, by going to a Whole Foods Market, an Amazon Hub locker or counter, or another  
 18 nearby pickup location. *See* Wilson Decl. ¶ 6. For all these reasons, the class of local delivery  
 19 drivers does not play a direct and necessary role in the transportation of goods across borders.

20 **2. The prior arbitration decisions in this case are no longer valid after**  
 21 ***Saxon*.**

22 Plaintiffs will likely argue that *Saxon* has no bearing on local delivery drivers. But the Fifth  
 23 Circuit’s recent application of *Saxon* holds otherwise. Moreover, the Supreme Court has already  
 24 determined that *Saxon*’s reasoning has implications for in-state delivery drivers’ status under the  
 25 FAA exemption by vacating a Ninth Circuit decision that rested on *Rittmann II*. *See Domino’s*  
 26 *Pizza, LLC v. Carmona*, 143 S. Ct. 361, 361 (2022). In that case, the Ninth Circuit had relied on

1 *Rittmann II* to hold that intrastate truck drivers were exempt from the FAA because they  
 2 “operate[d] in a ‘single, unbroken stream of interstate commerce’” and engaged in “transportation  
 3 of interstate goods on the final leg of their journey.” *Carmona v. Domino’s Pizza, LLC*, 21 F.4th  
 4 627, 629-30 (9th Cir. 2021) (addressing intrastate deliveries of ingredients from Domino’s  
 5 warehouses). The Supreme Court granted certiorari and vacated that Ninth Circuit decision,  
 6 determining that it warranted “further consideration in light of *Southwest Airlines Co. v. Saxon*.”  
 7 *Carmona*, 143 S. Ct. at 361. Given *Carmona*’s heavy reliance on *Rittmann II*, the Supreme Court’s  
 8 decision to vacate and remand confirms that *Rittmann II* requires reassessment in light of *Saxon*.

9 And under that necessary reassessment, *Rittmann I* and *II* violate the Supreme Court’s new  
 10 instructions in *Saxon* in two ways. The past decisions in this case therefore cannot justify  
 11 exempting the Arbitration Plaintiffs from the FAA.

12 **a. *Saxon* forecloses focusing on Amazon’s business operations.**

13 First, *Saxon*’s instruction on how to define the relevant class of workers preclude the  
 14 definition used in the prior rulings in this case. Those rulings defined the class of workers as drivers  
 15 who perform the “last leg” of an interstate journey, incorporating information about the interstate  
 16 footprint of other components of Amazon’s shipping and logistics activities in the characterization  
 17 of local workers who did not perform those broader activities. *See, e.g., Rittmann II*, 971 F.3d at  
 18 917 (“AmFlex workers complete the delivery of goods that Amazon ships across state lines”);  
 19 *Rittmann I*, 383 F. Supp. 3d at 1200 (“Defendants are in the business of delivering packages and  
 20 goods across the country that are not transformed or modified during the shipping process.”). This  
 21 consideration of Amazon’s broader business was a major point of disagreement between the  
 22 *Rittmann II* majority and dissent. The dissent agreed with Amazon that Amazon’s business  
 23 operations were irrelevant because the statutory text centers on the work the workers perform and  
 24 because “the out-of-state nature of the goods is irrelevant to the actual work the AmFlex workers  
 25 perform.” *Rittmann II*, 971 F.3d at 926 (Bress, J., dissenting) (“While no one doubts that Amazon  
 26 is of course engaged in interstate commerce (if that were the only question this would be a very

1 easy case), the interstate provenance of Amazon packages does not affect the actual work that local  
 2 AmFlex workers do.”). But the majority followed the First Circuit in holding that “[t]he nature of  
 3 the business for which a class of workers perform their activities must inform that assessment.” *Id.*  
 4 at 917 (quoting *Waithaka*, 966 F.3d at 19); *see also Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 866  
 5 (9th Cir. 2021) (discussing *Rittmann II*’s emphasis on “the interstate nature of Amazon’s  
 6 business”); *Carmona*, 21 F.4th at 630 (discussing *Rittmann II*’s emphasis on the fact that “Amazon  
 7 coordinated the deliveries from origin to destination”); *Rittmann I*, 383 F. Supp. 3d at 1200  
 8 (emphasizing that “Defendants are in the business of shipping goods across state lines”). Indeed,  
 9 because of *Rittmann II*, the Ninth Circuit has characterized “the interstate nature of an employer’s  
 10 business as the *critical factor* for determining whether a worker qualifies for the § 1 exemption.”  
 11 *In re Grice*, 974 F.3d 950, 957 (9th Cir. 2020) (emphasis added); *accord Capriole*, 7 F.4th at 861;  
 12 *Carmona*, 21 F.4th at 629.

13 The approach of *Rittmann II* and its progeny does not survive *Saxon*. Under *Saxon*, defining  
 14 the class of workers turns on evidence about what the workers “actually” do, not what the business  
 15 does. *Saxon*, 142 S. Ct. at 1788-89; *Lopez*, 47 F.4th at 431. It is therefore wrong to define the class  
 16 of workers as drivers performing the “last leg” of an interstate journey. That definition improperly  
 17 incorporates facts about Amazon’s interstate transportation operations, even though local drivers  
 18 are not involved in, or even affected by, those cross-border business activities. *See, e.g.*,  
 19 *Rittmann II*, 971 F.3d at 926 (Bress, J., dissenting) (“[F]rom the perspective of the local delivery  
 20 person, whether he is delivering goods from out of state is irrelevant to his work.”).

21 More than that, *Saxon* rejected these courts’ rationale for emphasizing “the nature of the  
 22 business for which the workers perform their activities.” *Waithaka*, 966 F.3d at 22. The First  
 23 Circuit rooted this approach in the interpretive canon of *ejusdem generis*: “Consideration of the  
 24 nature of the hiring company’s business . . . construe[s] the residual clause of Section 1 consistently  
 25 with the specific preceding categories of workers—‘seamen’ and ‘railroad employees’—whose  
 26 employment contracts are exempt from the FAA.” *Id.* at 23. The First Circuit thought that both

“seamen” and “railroad employees” are “defined by the nature of the business for which they work.” *Id.* The Ninth Circuit also followed this reasoning. *Rittmann II*, 971 F.3d at 917. But *Saxon* criticized the *Saxon* plaintiff’s attempt to apply *ejusdem generis* this way. The Supreme Court explained that “[i]n 1925, seamen did not include all those employed by companies engaged in maritime shipping.” *Saxon*, 142 S. Ct. at 1791. The term instead “include[d] only those who work[ed] on board a vessel, [who] constitute[d] a subset of workers engaged in the maritime shipping industry.” *Id.* Because the term “seamen” (unlike “railroad employees”) does not define workers in reference to the hiring business’s identity, *Waithaka* and *Rittmann II* erred in using *ejusdem generis* to justify consideration of the workers’ company or industry. *See id.*

Courts must define exempt classes of workers based on what they do, not what their company does. That means the relevant class here is local delivery drivers, not “last mile” or “last leg” drivers as the earlier *Rittmann* decisions determined. *See Lopez*, 47 F.4th at 431-32.

**b. Saxon adopts a narrower definition of engaging in interstate commerce.**

The *Rittmann* decisions violate *Saxon* in a second way by holding that delivery drivers need *not* be directly and actively involved in transportation across borders: it is enough to carry “goods that remain in the stream of interstate commerce until they are delivered.” *Rittmann II*, 971 F.3d at 915; *see also Rittmann I*, 383 F. Supp. 3d at 1196 (relying on pre-*Saxon* cases extending the exemption to drivers performing in-state transportation of “a good that is undisputedly in the stream of interstate commerce”); *Waithaka* 966 F.3d at 23 (construing the exemption “to encompass workers who are transporting goods within the flow of interstate commerce”).

But by requiring the workers’ direct and active role in the interstate part of the goods’ transit—“transporting goods across state or international borders”—*Saxon* rejects the “stream” or “flow” of interstate commerce test for the FAA. That is no accident: the Supreme Court was fully aware of the *Rittmann II* decision, which it cited, and the Supreme Court has applied a flow of interstate commerce test when interpreting other statutes that refer to interstate commerce.

1 *Compare Saxon*, 142 S. Ct. at 1789-90 & n.2, 1792, with *Rittmann II*, 971 F.3d at 913-14, and  
 2 *Waithaka*, 966 F.3d at 18-19, 24. Yet the *Saxon* Court did not adopt “flow of interstate commerce”  
 3 as the test for the FAA exemption. Had it done so, the decision would have been much shorter,  
 4 because there is no doubt that airline luggage is in the flow of interstate commerce. Instead, the  
 5 Supreme Court determined that the FAA’s unique language requires the workers’ direct and active  
 6 role in cross-border transit. *Saxon*, 142 S. Ct. at 1789-90. This deliberate decision not to embrace  
 7 a “flow of interstate commerce” test for the FAA shows that *Rittmann* and *Waithaka* decisions  
 8 erred in applying that standard to Amazon Flex drivers. *See Lopez*, 47 F.4th at 432-33 (applying  
 9 *Saxon*’s direct-and-active-role test, not a flow-of-commerce test).

10 Pre-FAA precedents also undermine those decisions’ attempt to collapse the distinction  
 11 between interstate and intrastate phases of transportation that occur as separate steps through  
 12 separate vehicles. Cases applying the U.S. Constitution establish that there may be an interior  
 13 movement of property which does not constitute interstate commerce, [even] though [the] property  
 14 [may] come from or be destined to another state.” *Diamond Match Co. v. Vill. of Ontonagon*, 188  
 15 U.S. 82, 96 (1903). The interstate movement begins when the goods are “shipped or started for  
 16 transportation from the one state to the other.” *Id.* at 95. But before that interstate movement  
 17 begins, “[t]he carrying of [goods] in carts or other vehicles, or even floating them, to the depot  
 18 where the journey is to commence, is no part of that journey.” *Id.* Similarly, under the Interstate  
 19 Commerce Act of 1887, once goods had arrived from out of state by interstate rail, delivering them  
 20 to their purchasers locally, in carts, was “a new and distinct service,” not part of the transportation  
 21 across state lines *ICC v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 167 U.S. 633, 643 (1897).  
 22 Likewise under the FAA, delivering an Amazon package in one’s own automobile is a new and  
 23 distinct service from any prior transportation by airplane, tractor-trailer, or some other vehicle that  
 24 may have crossed state lines. Wilson Decl. ¶¶ 10-11, 16-20; *see also, e.g., New York ex rel. Pa.*  
 25 *R.R. Co. v. Knight*, 192 U.S. 21, 28 (1904) (concluding, under U.S. Constitution, that railroad’s  
 26 local cab service between train station and interstate passengers’ residences or hotels was “an

1 independent local service, preliminary or subsequent to any interstate transportation”).

2 *Rittmann II* dismissed the Supreme Court’s differentiation between cross-border and local  
3 transit in the *Knight* case because it involved a question about taxation: whether the Constitution  
4 permitted the state of New York to tax a local transportation service that was associated with cross-  
5 border transportation. *See Rittmann II*, 971 F.3d at 916. But regardless of the legal question *Knight*  
6 happened to involve, *Saxon* shows that pre-FAA cases can help decide when particular  
7 transportation is “part of the interstate transportation of goods” for purposes of the FAA. *Saxon*,  
8 142 S. Ct. at 1789. The cases that *Saxon* cited show that under the FAA, loading and unloading  
9 the vehicles cross state lines is directly part of the cross-border transportation. *See id.* at 1790. But  
10 *Knight*, *ICC*, and other cases show that so-called “last leg” transportation is not.

11 Even when Amazon Flex drivers deliver brown-box packages that may have crossed state  
12 lines, they do not hitch an interstate trailer to their cars to drive its contents the last step of its way.  
13 They take local routes to deliver items that other workers have previously brought to the pickup  
14 location in wholly different vehicles. Wilson Decl. ¶¶ 16-20. The Arbitration Plaintiffs therefore  
15 do not belong to a class of workers directly involved in cross-border transportation under *Saxon*,  
16 and the FAA applies and requires them to arbitrate. *See Lopez*, 47 F.4th at 433.

### 17 **3. Many Plaintiffs are non-exempt even under the *Rittmann* decisions.**

18 Even if the *Rittmann* decisions survived *Saxon*, the FAA would still require holding many  
19 Arbitration Plaintiffs to their agreements. *Saxon* is clear that a court must categorize individual  
20 plaintiffs within a “class of workers” based on their own actual activities. 142 S. Ct. at 1788-89;  
21 *see also Lopez*, 47 F.4th at 431.

22 Here, the activities actually performed by several dozen Arbitration Plaintiffs show that  
23 they do not belong to a class of “last leg” delivery drivers and thus are not exempt even under the  
24 prior *Rittmann* cases. In particular, some Arbitration Plaintiffs could not have frequently  
25 performed the “last leg” of a shipment that crossed state lines because the overwhelming majority  
26 of the items they delivered were at rest in the same state as the customer when the order began.



**a. The class of California Amazon Flex drivers do not frequently perform last legs of interstate shipments.**

Fifty-four Arbitration Plaintiffs performed Amazon deliveries in California. Wilson Decl. Appx. B. Because of California’s large number of Amazon fulfillment centers, these drivers belong to a class of workers especially far removed from cross-border transportation. The evidence shows that these drivers do not frequently perform the last legs of shipments that crossed state lines to get to the customer who orders them. California Amazon Flex drivers therefore are not exempt from the FAA even under the prior *Rittmann* decisions.

That analysis presupposed that Amazon Flex drivers deliver items that must cross state lines to get to the customer because they are located in another state at the time the order is placed. *See, e.g., Rittmann II*, 971 F.3d at 915-16. Other courts have emphasized this key premise underlying *Rittmann II*. *See, e.g., Immediato v. Postmates, Inc.*, No. CV 20-12308-RGS, 2021 WL 828381, at \*2 (D. Mass. Mar. 4, 2021) (explaining that *Rittmann II* conceived of “Amazon shipments [as] travel[ing] through a national network of warehouses in which the in-state warehouse is simply a staging stop in the interstate journey”); *Ross*, 2021 WL 6072593, at \*8 (concluding that *Rittmann II* does not support applying the FAA exemption when “products came from out of state, [but] had not been purchased at the time of arrival at the warehouse [and] would instead come to rest until ordered by a customer”).

The record here refutes this key premise for the 54 Arbitration Plaintiffs who deliver in California. The goods that California Delivery Partners deliver are almost always in the same state as the customer when the customer places the order. To start, nearly two-thirds (62%) of all Amazon Flex delivery blocks in California, since the program’s inception, have been for locally stocked items like restaurant meals, groceries, or same-day merchandise under the GSF or SSD programs. Nickerson Decl. ¶¶ 5-6; Wilson Decl. ¶¶ 13-14. As noted above, such deliveries are not exempt even under *Rittmann II*. *See, e.g., Rittmann II*, 971 F.3d at 916-17; *O’Shea*, 508 F. Supp. 3d at 287 (groceries); *Bean*, 533 F. Supp. 3d at 1236 (same-day merchandise). And for California



1 AMZL blocks (involving brown-box orders that originate at an Amazon fulfillment center), today  
 2 roughly 70% of the orders start their movement to the California customer from a California  
 3 fulfillment center. Wilson Decl. ¶¶ 15, 18. In other words, only 30% of the delivered goods are  
 4 outside California when a California customer orders them. And the items that originate from these  
 5 California fulfillment centers have been in California, on average, for over 30 days. *Id.* ¶ 18.

6 Together, these statistics show that only about 30% of 38% of the Amazon Flex delivery  
 7 work in California—or about 11%—could possibly qualify as “last legs” of shipments that crossed  
 8 state lines and trigger the FAA exemption under *Rittmann II*. In other words, around 89% of  
 9 California Amazon Flex work is not spent performing the “last leg” of such shipments. As a result,  
 10 Amazon Flex drivers in California do not belong to a class of drivers that perform exempt “last  
 11 mile” deliveries under *Rittmann II*. Plaintiffs in FAA exemption disputes belong to a class of  
 12 workers depending on what they “typically” or “frequently” do. *Saxon*, 142 S. Ct. at 1788-89.  
 13 Workers who perform a certain activity “for up to three shifts per week” perform that activity “on  
 14 a frequent basis.” *Id.* But workers who perform a certain activity only around 10-13% of the time  
 15 perform that activity “only occasionally.” *Capriole*, 7 F.4th at 864 (describing work that made up  
 16 roughly 10.1% to 12.6% of all Uber trips). Amazon Flex drivers delivering in California are not  
 17 exempt from the FAA even under *Rittmann II*.

18 **b. Many Arbitration Plaintiffs never, or almost never, signed up**  
 19 **for delivery blocks involving brown-box orders.**

20 For similar reasons, the *Rittmann* decisions do not support applying the exemption to those  
 21 Arbitration Plaintiffs who never—or almost never—performed the sorts of brown-box deliveries  
 22 that could qualify as “last leg” deliveries of goods shipped to the customer across state lines.  
 23 Amazon’s records through July 2022 reveal that 31 Arbitration Plaintiffs performed fewer than  
 24 10% of their delivery blocks within the AMZL category involving items stocked in Amazon’s  
 25 network of fulfillment centers, as opposed to GSF or SSD delivery blocks of items stocked locally  
 26 at grocery pickup locations, restaurants, or same-day centers. *See Nickerson Decl.* ¶¶ 5, 7. And 18

1 of these Plaintiffs *never* performed AMZL delivery blocks during this period. *See id.* ¶ 7.

2 So even if it were appropriate to describe some Amazon Flex drivers as performing the last  
3 legs of shipments that crossed state lines, those who never (or almost never) performed such “last  
4 leg” deliveries cannot bear that label consistent with *Saxon*. Such deliveries were not a typical or  
5 frequent part of these drivers’ transportation work. And because grocery, restaurant, and same-day  
6 delivery is not exempt transportation even under the prior *Rittmann* decisions, *see supra* pp. 12-  
7 13, those decisions cannot support exempting these 31 drivers from the FAA.

#### 8 **4. The FAA requires arbitration of Plaintiffs’ PAGA claims.**

9 Three Arbitration Plaintiffs—Iain Mack, Adriana Ponce, and Sean M. Hoyt—assert claims  
10 under California’s Private Attorneys General Act (“PAGA”). Compl. ¶¶ 7, 200-02. Mack initially  
11 agreed to Version 9 of the TOS, and Ponce and Hoyt initially agreed to Version 10, and none of  
12 the three opted out of the arbitration provision. Wilson Decl. ¶¶ 79, 90, 104, 137, Appx. A. And  
13 for reasons discussed above, their agreements are not exempt from the FAA: (1) like all Amazon  
14 Flex Delivery Partners, they belong to the class of local delivery drivers and such local delivery  
15 does not qualify as direct or active involvement in transporting goods across borders, *see supra*  
16 Section III.B.1; and (2) they are California Delivery Partners and as such do not frequently or  
17 typically perform the last leg of shipments that cross state lines, *see supra* Section III.B.3.a; and  
18 (3) over 90% of Hoyt’s delivery blocks were in the GSF category of grocery, restaurant, and same-  
19 day orders, *see supra* Section III.B.3.b; Nickerson Decl. ¶ 7. Because these three drivers are not  
20 exempt from the FAA, they must arbitrate their individual PAGA claims in accordance with the  
21 Supreme Court’s recent decision in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022).

22 Until abrogated by *Viking River*, the rule of *Iskanian v. CLS Transportation Los Angeles*,  
23 *LLC*, 327 P.3d 129 (Cal. 2014), prevented PAGA claims from being compelled to individual  
24 arbitration. Among other things, *Iskanian* precluded the division of PAGA actions into arbitrable  
25 “individual PAGA claims for Labor Code violations that [a particular] employee suffered” and  
26 non-individual or “*representative*” claims based on the Labor Code violations allegedly suffered

1 by other employees. *Id.* at 149; *see also Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1132 (Cal.  
 2 2020) (“Appellate courts have rejected efforts to split PAGA claims into individual and  
 3 representative components.”).

4 But this aspect of *Iskanian* is no longer good law. *Viking River* held that the FAA preempts  
 5 the “indivisibility” rule in *Iskanian* “insofar as it precludes division of PAGA actions into  
 6 individual and non-individual claims through an agreement to arbitrate” and bars an individual  
 7 PAGA claim from being compelled to arbitration. 142 S. Ct. at 1922-25. Because *Iskanian*’s  
 8 indivisibility rule is preempted, the employer in *Viking River* “was entitled to enforce the  
 9 agreement insofar as it mandated arbitration of [plaintiff’s] individual PAGA claim.” *Id.* at 1925.

10 The same conclusion holds here. These three Plaintiffs expressly agreed to arbitrate their  
 11 Amazon Flex-related disputes “ON AN INDIVIDUAL BASIS THROUGH FINAL AND  
 12 BINDING ARBITRATION.” *See* TOS v.9-v.10 § 11(b). This language unambiguously  
 13 encompasses individual PAGA claims based on alleged Labor Code violations that involve  
 14 Plaintiffs individually. And it precludes Mack, Ponce, and Hoyt from seeking an arbitration  
 15 recovery based on alleged Labor Code violations that involve other workers. Indeed, the TOS  
 16 explicitly states that, “TO THE EXTENT PERMITTED BY LAW,” any arbitration proceedings  
 17 “WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS” and *not* “ON A  
 18 REPRESENTATIVE BASIS.” TOS v.9-v.10 § 11(b)-(c).

19 In thus specifying that “NO DISPUTE RESOLUTION PROCEEDING WILL BE  
 20 CONDUCTED ON A REPRESENTATIVE BASIS,” the TOS does not attempt a “wholesale”  
 21 waiver of the right to bring any representative PAGA action in arbitration. *See Viking River*, 142  
 22 S. Ct. at 1924. As *Viking River* explains, while all “PAGA actions are ‘representative’ in that they  
 23 are brought by employees acting as representatives . . . of the State,” they are also “representative”  
 24 in a second sense “when they are predicated on code violations sustained by other employees. *Id.*  
 25 at 1916. And “when the word ‘representative’ is used in the second way, it makes sense to  
 26 distinguish ‘individual’ PAGA claims, which are premised on Labor Code violations actually

sustained by the plaintiff, from ‘representative’ (or perhaps quasi-representative) PAGA claims arising out of events involving other employees.” *Id.* The TOS draws exactly this distinction, agreeing to the arbitration of “INDIVIDUAL” claims but, “TO THE EXTENT PERMITTED BY LAW,” not “REPRESENTATIVE” claims.<sup>1</sup>

In addition, *Viking River* instructs that even if an agreement does contain an unenforceable wholesale waiver of the right to bring PAGA actions, the agreement is still enforceable as to the individual component of the PAGA claim so long as the agreement has a severability clause. *See id.* at 1925 (“[T]he severability clause in the agreement provides that if the waiver provision is invalid in some respect, any ‘portion’ of the waiver that remains valid must still be ‘enforced in arbitration.’”). Here, the agreement contains a severability clause, which states that “[i]f any provision of this Agreement is determined to be unenforceable, the parties intend that this Agreement be enforced as if the unenforceable provisions were not present and *that any partially valid and enforceable provisions be enforced to the fullest extent permissible under applicable law.*” TOS v.9-v.10 § 16 (emphasis added). The relevant “valid and enforceable provisions” of the agreement are those requiring Mack, Ponce, and Hoyt to arbitrate their Amazon Flex-related claims on an individual basis, including his individual PAGA claims. *See Viking River*, 142 S. Ct. at 1924-25 (holding that the severability clause entitled employer to enforce the agreement “insofar as it mandated arbitration of [the employee’s] individual PAGA claim.”).

The Court should uphold these agreements and dismiss the non-individual PAGA claims. *Viking River* held that when a PAGA plaintiff’s individual claim is compelled to arbitration, that plaintiff lacks standing to maintain representative non-individual PAGA claims and so those court claims must be dismissed. As the Supreme Court observed, “PAGA provides no mechanism to

---

<sup>1</sup> Were it ambiguous whether the parties agreed to arbitrate individual PAGA claims, federal and state law would resolve that ambiguity in favor of arbitration. *See, e.g., Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (“[W]e have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration.”); *Wagner Constr. Co. v. Pac. Mech. Corp.*, 41 Cal. 4th 19, 26 (2007) (“Even were the language less clear, ‘doubts concerning the scope of arbitrable issues’ would still have to be ‘resolved in favor of arbitration.’” (citation omitted)).

enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding.” 142 S. Ct. at 1913. PAGA lacks such a mechanism because, under its statutory “standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action.” *Id.* (citing California Labor Code Sections 2699(a) and (c), which together only authorize PAGA civil actions “brought by an aggrieved employee on behalf of himself or herself and other current or former employees”). When a plaintiff’s individual PAGA claim is compelled to arbitration, the plaintiff “lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.” *Id.* So the Court should compel Mack’s, Ponce’s, and Hoyt’s individual PAGA claims to arbitration and dismiss their non-individual PAGA claims. *See, e.g., Callahan v. Paychex N. Am. Inc.*, No. 21-CV-05670-CRB, 2022 WL 11902205, at \*8 (N.D. Cal. Oct. 20, 2022); *Johnson v. Lowe’s Home Centers, LLC*, No. 221CV00087TLNJDP, 2022 WL 4387796, at \*4 (E.D. Cal. Sept. 22, 2022); *Radcliff v. San Diego Gas & Elec. Co.*, No. 20-CV-1555-H-MSB, 2022 WL 4229305, at \*4 (S.D. Cal. Sept. 12, 2022).<sup>2</sup>

**C. State law requires enforcing the Arbitration Plaintiffs’ agreements.**

Even if the agreements were exempt from the FAA, they would still be binding contracts to arbitrate and enforceable under applicable state law. *See, e.g., Chappel v. Lab’y Corp. of Am.*, 232 F.3d 719, 725 (9th Cir. 2000) (explaining that the FAA’s “distinctive procedural apparatus” falls away when the exemption applies, but the parties are still “required under the law of contract to arbitrate”); *Romero v. Watkins & Shepard Trucking, Inc.*, No. 20-55768, 2021 WL 3675074, at \*1 (9th Cir. Aug. 19, 2021) (using Nevada arbitration law to enforce an arbitration agreement held exempt from the FAA).

---

<sup>2</sup> Were the Court to decline at this time to follow *Viking River* on this point and dismiss these three Plaintiffs’ non-individual PAGA claims, the Court should stay this action pending their individual arbitrations. *See, e.g., Martinez-Gonzalez v. Elkhorn Packing Co.*, No. 18-CV-05226-EMC, 2022 WL 10585178, at \*12 (N.D. Cal. Oct. 18, 2022); *see also Franco v. Arakelian Enters., Inc.*, 234 Cal. App. 4th 947, 966 (2015) (staying PAGA action pending plaintiff’s compelled individual arbitration); *see also Fed. Ins. Co. v. Superior Court*, 60 Cal. App. 4th 1370, 1374-75 (1998) (“The stay’s purpose is to preserve the status quo until the arbitration is resolved, preventing any continuing trial court proceedings from disrupting and rendering ineffective the arbitrator’s jurisdiction to decide the issues.”).

1 If the FAA exemption makes the FAA inapplicable, the question becomes *which state law*  
 2 applies to each contract under conflict-of-law principles. *See, e.g., Harper v. Amazon.com Servs.,*  
 3 *Inc.*, 12 F.4th 287, 294-95 (3d Cir. 2021) (“[T]he parties still have an agreement to arbitrate, and  
 4 if federal law does not govern the arbitrability of their contract, *some* law must. . . . Generally, a  
 5 court can only determine *whether* state law provides grounds for arbitration by deciding *what* state  
 6 law applies[.]”); *Romero*, 2021 WL 3675074, at \*1 (“[B]ecause the FAA § 1 exemption applies[,]  
 7 . . . [w]e must . . . decide the governing state law.”). Here, that question turns on Washington  
 8 conflict-of-laws principles because the forum state for this litigation is Washington. *See, e.g.,*  
 9 *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (“The conflict of laws rules to be  
 10 applied by the federal court in Delaware must conform to those prevailing in Delaware’s state  
 11 courts.”); *Harper*, 12 F.4th at 295 (“When engaging in substantive contractual interpretation, a  
 12 federal court must look to the choice-of-law rules of the forum state[.]”). For contractual disputes,  
 13 Washington conflict-of-laws principles follow Sections 187 and 188 of the *Restatement (Second)*  
 14 *of Conflicts of Laws*. *See, e.g., Shanghai Com. Bank Ltd. v. Chang*, 404 P.3d 62, 65-69 (Wash.  
 15 2017). Under these rules, the governing law depends on whether the contracting parties have made  
 16 an effective choice of law. *See id.*; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186–88  
 17 (1971) (“*Restatement*”). Washington courts “generally enforce contract choice of law provisions.”  
 18 *Schnall v. AT & T Wireless Servs., Inc.*, 259 P.3d 129, 131 (Wash. 2011) (citation omitted).<sup>3</sup>

19 This framework leads to two central conclusions. First, the Arbitration Plaintiffs who are  
 20 bound by TOS Versions 11 and 12 must arbitrate under the law of Delaware, where Amazon is  
 21 incorporated, because their choice-of-law provisions select Delaware law if the FAA is  
 22 inapplicable. Second, the remaining Arbitration Plaintiffs, who are bound by earlier TOS versions,

---

23 <sup>3</sup> Were Plaintiffs to argue that California law supplies the appropriate conflict-of-laws principles  
 24 for those Plaintiffs who originally filed their claims in California, the outcome would not change.  
 25 Like Washington, California follows Sections 187 and 188 of the *Restatement* and recognizes “a  
 26 strong policy favoring enforcement of [choice-of-law] provisions.” *Nedlloyd Lines B.V. v.*  
*Superior Ct.*, 834 P.2d 1148, 1151 (Cal. 1992); *see also, e.g., Stonewall Surplus Lines Ins. Co. v.*  
*Johnson Controls, Inc.*, 14 Cal. App. 4th 637, 646 (1993).



1 must arbitrate under the laws of the states with the most significant relationship to those contracts,  
 2 which are ordinarily the states where the Arbitration Plaintiffs performed Amazon Flex services.

3 **1. Arbitration Plaintiffs who accepted post-2019 TOS versions must**  
 4 **arbitrate under Delaware law.**

5 Since October 3, 2019, the TOS has specified that Delaware law governs its arbitration  
 6 provisions (Section 11) as a fallback to the FAA: “[i]f, for any reason, the [FAA] is held by a court  
 7 of competent jurisdiction not to apply to Section 11 of this Agreement, the law of the state of  
 8 Delaware will govern Section 11 of this Agreement.” TOS v.11 § 12; *see also* TOS v.12 § 12 (“If,  
 9 for any reason, the [FAA] is held by a court of competent jurisdiction not to apply to Section 11  
 10 of this Agreement, the law of the state of Delaware and the Delaware Uniform Arbitration Act, 10  
 11 Del. C. § 5701 et seq. will govern Section 11 of this Agreement[.]”).

12 These TOS versions—Versions 11 and 12—did not exist when this Court resolved  
 13 Amazon’s original motion to compel arbitration and thus were not at issue in *Rittmann I* or *II*. But  
 14 their clear selection of Delaware law as a fallback to the FAA requires enforcing these agreements  
 15 to arbitrate even if the FAA exemption applies. Courts widely enforce FAA-exempt arbitration  
 16 agreements under the parties’ chosen body of state law. *See, e.g., Romero*, 2021 WL 3675074, at  
 17 \*1 (enforcing exempt agreement under Nevada law); *Palcko v. Airborne Express, Inc.*, 372 F.3d  
 18 588, 596 (3d Cir. 2004) (enforcing exempt agreement under Washington law); *Abram v. C.R. Eng.,*  
 19 *Inc.*, No. 20-cv-764, 2020 WL 5077373, at \*7 (C.D. Cal. June 23, 2020) (enforcing exempt  
 20 agreement under Utah law).

21 Delaware law requires enforcing these arbitration agreements. The Delaware Supreme  
 22 Court has long stressed that “the public policy of [Delaware] favors the resolution of disputes  
 23 through arbitration.” *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 911 (Del. 1989)  
 24 (citation omitted). Reflecting that policy, Delaware “enacted a Uniform Arbitration Act” that is  
 25 “similar to the [FAA].” *Id.* (citing DEL. CODE tit. 10, §§ 5701-5725). Like the FAA, the Delaware  
 26 Uniform Arbitration Act “provides that ‘a written agreement to submit to arbitration any

controversy existing at or arising after the effective date of the agreement is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.* (quoting DEL. CODE tit. 10, § 5701). And “[a]ny doubt as to arbitrability is to be resolved in favor of arbitration.” *SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 761 (Del. 1999). Where, as here, “there is no substantial question whether a valid agreement to arbitrate in [Delaware] was made or complied with the Court shall order the parties to proceed with arbitration.” DEL. CODE tit. 10, § 5703. Delaware law does not exempt any transportation workers from arbitration, nor is there any other basis not to enforce these arbitration agreements through Delaware law. *See, e.g., Haider v. Lyft, Inc.*, No. 20-CV-2997 (AJN), 2021 WL 3475621, at \*4 (S.D.N.Y. Aug. 6, 2021) (enforcing FAA-exempt arbitration agreement under Delaware choice-of-law provision).

As explained next, dozens of Arbitration Plaintiffs accepted Version 11 and/or Version 12 of the TOS after October 3, 2019. Some did so by clicking a button accepting Version 11 as the then-current version when they initially signed up for Amazon Flex. Some did so by clicking a button accepting Version 12 within the Amazon Flex app. And some did so by continuing to make deliveries after receiving email notice of the TOS update. All these Arbitration Plaintiffs therefore must arbitrate under Delaware law.

**a. Arbitration Plaintiffs who signed up after October 2, 2019  
selected Delaware law and accepted a delegation provision.**

All Amazon Flex drivers agree to the then-current TOS when they sign up to be eligible to make deliveries by affirmatively clicking their assent through the Amazon Flex app. Here, 9 Arbitration Plaintiffs—Juan Manuel Alvarez, Sancak Davarci, Ricky Diaz, LaQuita Houston, Marie Y. Solis, Matthew Talbot, Bryan Wells, Cinthia Yarleque, and Michael Zollner—accepted Version 11 originally because that was the current version when they originally signed up for Amazon Flex. Wilson Decl. ¶¶ 43, 58-59, 77, 117, 119, 124, 130, 135.

These 9 Arbitration Plaintiffs’ claims necessarily arose or accrued after they accepted



Version 11 of the TOS. They did not perform any Amazon Flex deliveries while earlier versions of the TOS were in effect. That is significant because Versions 11 and 12, unlike some earlier TOS versions, include a delegation provision in which the parties agreed to arbitrate not just substantive disputes but also disputes over arbitrability. In particular, Section 11(k) of Version 11 and Section 11(i) of Version 12 provide for arbitration under the Commercial Arbitration Rules of the American Arbitration Association (“AAA”). TOS v.11 § 11(k); TOS v.12 § 11(i). The AAA’s Commercial Arbitration Rules empower the arbitrator to decide questions of arbitrability. AM. ARB. ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-7(a), at 13 (2016) (“The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.”), <https://adr.org/sites/default/files/Commercial%20Rules.pdf>. As a result, agreeing to arbitrate under these rules clearly and unmistakably delegates arbitrability disputes to the arbitrator. *See, e.g., Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (“[I]ncorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability.”); *Carder v. Carl M. Freeman Communities, LLC*, No. CIV.A. 3319-VCP, 2009 WL 106510, at \*6 (Del. Ch. Jan. 5, 2009) (“[T]he arbitration clause at issue in this case references AAA Rules that empower the arbitrator to determine questions as to her own jurisdiction and reflects a decision of the parties to use AAA arbitration to resolve a wide range of disputes.”). Versions 11 and 12 likewise explain that while courts resolve issues like the validity and enforceability of the contract as a whole and whether the agreement is exempt from the FAA, the “arbitrator must resolve all other disputes, including . . . the arbitrability of claims” under Section 11(a). TOS v.11 § 11(l); TOS v.12 § 11(j).

This delegation provision assigns to the arbitrator, rather than this court, any challenge Plaintiffs may raise to the choice-of-law provision requiring enforcement of the arbitration agreement through Delaware law. For example, in *Ratajesak v. New Prime, Inc.*, No. SACV189396DOCAGRX, 2019 WL 1771659, at \*3-4 (C.D. Cal. Mar. 20, 2019), California

employees had agreed to enforce an FAA-exempt arbitration provision under Missouri law but tried to avoid arbitration by arguing that the choice-of-law provision was unenforceable and violated fundamental California policies. Because the contracts had a delegation provision, however, the court determined that it could not consider whether “California policy governing arbitration of unpaid wages” precluded enforcement of the arbitration and choice-of-law provisions. *Id.* at \*5. The plaintiffs had to raise such challenges before the arbitrator. *Id.* at \*7; *see also Parker v. New Prime, Inc.*, No. LACV2003298DOCAGR, 2020 WL 6143596, at \*4 (C.D. Cal. June 9, 2020) (following *Ratajesak* on this point).

Here too, any challenges these 9 Arbitration Plaintiffs may wish to raise against the choice-of-law provision are reserved for the arbitrator and are no barrier to compelling arbitration.<sup>4</sup> In any event, as detailed below in Section III.C.1.c, the choice of Delaware law is valid and enforceable.

**b. Arbitration Plaintiffs who clicked acceptance to Version 12  
selected Delaware law and accepted a delegation provision.**

When Amazon introduced Version 12 for Delivery Partners in California with existing accounts, the app presented the new terms in their entirety and the existing California account holders had to manually click acceptance to the new terms if they wished to continue participating in the Amazon Flex program—much as they had to manually click acceptance in signing up originally. Wilson Decl. ¶¶ 138-39. Here, 13 Arbitration Plaintiffs in California—Ramin Akramy, Timothy Clarke, Mervyn Cole, Noor Dahy, Carlos Esquivel Gonzalez, Shawn Miller, Shanita Murray, Helai Olomi, Louie Ronquilo, Jon Shehab, Marie Y. Solis, Bryan Wells, and Zouaoui Zazou—clicked the button in the Amazon Flex app signifying their assent to Version 12. Wilson Decl. ¶¶ 140-53. They are bound by that agreement in full, just as they were bound by the version they originally accepted in the app. *See, e.g., Hauenstein*, 2007 WL 2404624, at \*3 (discussing how clicking agreement to an online contract constitutes assent). And for the reasons just given,

<sup>4</sup> Because of the delegation provision, these 9 Arbitration Plaintiffs would also have to arbitrate unconscionability challenges to the arbitration provision and disputes over whether the provision covers their claims. *See, e.g., Brennan*, 796 F.3d at 1128-31 (unconscionability); *Carder*, 2009 WL 106510, at \*8 (scope of arbitration clause).

the delegation provision in Version 12 requires these Arbitration Plaintiffs to arbitrate any disputes they might wish to raise over arbitrability. *See supra* Section III.C.1.a.

**c. Arbitration Plaintiffs who continued delivering after October 2019 accepted a TOS modification selecting Delaware law.**

Amazon's records show that Arbitration Plaintiffs agreed to Version 11 and/or Version 12 as a modification to a previously accepted version of the TOS. Wilson Decl. ¶¶ 157-91. Each relevant TOS version has a modification provision stating that Amazon could modify the TOS by giving notice to existing drivers and that these drivers are bound by the modifications if they continue to perform deliveries after receiving such notice. TOS v.6-v.8 § 14; TOS v.9-v.12 § 13. In accordance with this procedure, Amazon sent emails to existing Amazon Flex drivers when it updated the TOS to Version 11 in 2019 and to Version 12 in 2021, explaining that the TOS was changing and that continued participation in Amazon Flex would constitute acceptance of the new terms. Wilson Decl. ¶¶ 155-56. Amazon also made the new versions accessible to existing drivers within the Amazon Flex app. *Id.* ¶ 30. Such individualized notice of a terms-of-service update is binding on the Arbitration Plaintiffs who continued to use the Amazon Flex app to perform deliveries after receiving the notice. *See, e.g., In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1167 (N.D. Cal. 2016) (explaining that "individualized notice" of a terms of service update "in combination with a user's continued use [of the defendant's platform] is enough for notice and assent"); *Webber v. Uber Techs., Inc.*, No. 18-cv-2941, 2018 WL 10151934, at \*4 (C.D. Cal. Sept. 5, 2018) ("Courts have found that when consumers receive emails such as this one, continued use of the service or product constitutes assent to the updated terms.").

The provisions in these agreements selecting Delaware law as a fallback to the FAA are fully enforceable. Under the governing framework from *Restatement* Section 187, the first question is whether Delaware has a substantial relationship to the parties or transaction or there is otherwise a reasonable basis for choosing Delaware law. *See, e.g., Shanghai Com. Bank*, 404 P.3d at 66-67; *Nedlloyd Lines*, 834 P.2d at 1152. Delaware satisfies this requirement because Amazon

is incorporated in Delaware. *See, e.g.*, RESTATEMENT § 187 cmt. f (explaining that “the state of the chosen law has some substantial relationship to the parties or the contract” and the parties have “a reasonable basis for their choice . . . when this state is that . . . where one of the parties is domiciled”); *Kaul v. Mentor Graphics Corp.*, 730 F. App’x 437, 439 (9th Cir. 2018) (“Delaware has a substantial connection to the parties’ transaction because it was the place of incorporation for . . . one of the contracting parties.”); *Gardensensor, Inc. v. Stanley Black & Decker, Inc.*, No. 12-CV-03922 NC, 2012 WL 12925714, at \*4 (N.D. Cal. Oct. 25, 2012) (“[A] substantial relationship between the parties and the forum exists where one party to the agreement is incorporated in the chosen state. Gardensensor is incorporated in the state of Delaware, and therefore has a substantial connection with the selected forum.” (citation omitted)).

The only possible question is whether enforcing the arbitration agreement through Delaware law would conflict with a fundamental public policy of the state with the most significant relationship to the issue. *See, e.g.*, *Shanghai Com. Bank*, 404 P.3d at 67; *Ziegler v. JP Morgan Chase Bank, N.A.*, No. 2:20-CV-00298-SAB, 2021 WL 6274448, at \*2 (E.D. Wash. Feb. 24, 2021). The Arbitration Plaintiffs bound by Versions 11 or 12 cannot make that showing and so must comply with the choice-of-law provision. *See, e.g.*, *Romero*, 2021 WL 3675074, at \*2 (enforcing arbitration provision under chosen Nevada law because plaintiff had failed to prove that the choice of Nevada law conflicted with fundamental California policies).

Indeed, as explained in the next section, the arbitration provisions in all the TOS versions would be enforceable under alternative state laws even if the choice of Delaware law were ineffective for some reason. Plaintiffs thus cannot show conflict between those states’ fundamental policies and Delaware’s with respect to enforcing the arbitration provisions here.

**2. Even without an express selection of Delaware law, Arbitration Plaintiffs must arbitrate under the laws of the states with the most significant relationship to their contracts.**

The Arbitration Plaintiffs who did not accept Version 11 or Version 12 still agreed to

1 arbitrate in earlier versions—just without choice-of-law provisions explicitly selecting Delaware  
 2 law as a fallback to the FAA. Amazon previously argued that the choice-of-law provisions in the  
 3 pre-2019 TOS versions select Washington law for the arbitration provisions. But this Court and  
 4 the Ninth Circuit disagreed, interpreting those choice-of-law provisions as containing “express  
 5 contractual language that precludes [Washington law’s] application.” *Rittmann II*, 971 F.3d at 921;  
 6 *see also Rittmann I*, 383 F. Supp. 3d at 1203 (“[I]t appears that it is precisely against the parties’  
 7 intent to apply Washington law to the Arbitration Provision.”). This interpretation hinged on the  
 8 language in the pre-2019 choice-of-law provisions, which select Washington law for the TOS  
 9 “except for” the arbitration provision in Section 11. TOS v.9-10 § 12; *see also* TOS v.6-8 § 13.

10 That interpretation, though, does not preclude applying ordinary conflict-of-laws principles  
 11 to identify which states besides Washington furnish the law governing the contractual promise to  
 12 arbitrate. As one court recently explained in discussing *Rittmann I* and *II*, “the problem with  
 13 applying Washington law as an alternate basis to compel arbitration was that ‘the parties [had]  
 14 explicitly contracted for Washington law to not apply to the Arbitration Provision.’” *Islam v. Lyft,*  
 15 *Inc.*, 524 F. Supp. 3d 338, 359 (S.D.N.Y. 2021) (quoting *Rittmann I*, 383 F. Supp. 3d at 1202). On  
 16 this view, “[a]pplying Washington law after the parties made clear in the contract that it did not  
 17 apply to the arbitration clause would have amounted to ‘rewrit[ing] the contract.’” *Id.* (quoting  
 18 *Rittmann II*, 971 F.3d at 920). But when the contracts say “nothing about the applicability of [a  
 19 different state’s] law in the event that the FAA was found not to apply[,] [t]here is . . . nothing  
 20 improper about applying standard choice-of-law principles to reach the conclusion that [some  
 21 state’s] law applies to the arbitration agreement in the absence of the FAA.” *Id.* at 359-60.

22 When a contract’s general choice-of-law provision has a “carveout” that subjects the  
 23 arbitration provision to the FAA instead of the state law that the contract selects for the other  
 24 provisions, the laws of *other* states remain fully available to enforce the arbitration provision even  
 25 if it is exempt from the FAA. *See, e.g., Singh v. Uber Techs., Inc.*, 571 F. Supp. 3d 345, 367 (D.N.J.  
 26 2021) (identifying applicable law through the forum state’s conflict-of-laws rules because the

1 contract’s choice-of-law provision “treats the arbitration provision differently from the rest of the  
 2 agreement”); *Nelson v. Gobrandts, Inc.*, No. 20-CV-5424-JMY, 2021 WL 4262325, at \*7 (E.D. Pa.  
 3 Sept. 20, 2021) (“A plain reading of the carveout in the Choice-of-Law Provision simply means  
 4 that Delaware law will not apply to the agreement to arbitration claims. Nothing suggests that the  
 5 rejection of Delaware law should preclude the Court from determining that the Arbitration  
 6 Provision is governed by either Pennsylvania or Illinois law.”). That conclusion fits with courts’  
 7 widely held view that, “even when the contract says that the [FAA] applies and mentions no other  
 8 law—if the federal act doesn’t apply, the agreement to arbitrate remains viable, and the only  
 9 question becomes what state’s law applies to the contract to arbitrate.” *Atwood v. Rent-A-Ctr. E.,*  
 10 *Inc.*, No. 15-CV-1023-MJR-SCW, 2016 WL 2766656, at \*3 (S.D. Ill. May 13, 2016); *see also,*  
 11 *e.g., Arafa v. Health Express Corp.*, 233 A.3d 495, 507 (N.J. 2020) (“[T]he NJAA [*i.e.*, New Jersey  
 12 Arbitration Act] will apply unless preempted even without being explicitly referenced in an  
 13 arbitration agreement; no express mention of the NJAA is required to establish a meeting of the  
 14 minds that it will apply inasmuch as its application is automatic.”). “[T]he effect of the FAA being  
 15 found inapplicable is only that the arbitration clause contains no choice-of-law provision, and  
 16 therefore that ‘the law of the jurisdiction having the greatest interest in the litigation will be  
 17 applied.’” *Islam*, 524 F. Supp. 3d at 359.

18 Under Washington conflict-of-laws rules, *Restatement* Section 188—titled “Law  
 19 Governing in Absence of Effective Choice by the Parties”—prescribes a “most significant  
 20 relationship” test if the contract does not have an effective choice-of-law provision. *See Shanghai*  
 21 *Com. Bank*, 404 P.3d at 67. Here, with one exception discussed below, this test compels application  
 22 of the laws of the states where the Arbitration Plaintiffs performed services. Those states are the  
 23 location of the services’ performance and of the subject matter of the contracts, and ordinarily also  
 24 the location of contracting and of a contracting party’s residence (because typically Delivery  
 25 Partners perform services in the states in which they live). *See Restatement* § 188(2); *Jorgensen v.*  
 26 *Cassiday*, 320 F.3d 906, 913-14 (9th Cir. 2003) (emphasizing similar factors in applying the

1 *Restatement*'s most significant relationship test to a contract for the rendition of services); *Baffin*  
 2 *Land Corp. v. Monticello Motor Inn, Inc.*, 425 P.2d 623, 628 (Wash. 1967) (same).

3 The one exception is for the 7 Arbitration Plaintiffs who performed services in Washington.  
 4 See Wilson Decl. Appx B. Because *Rittmann I* and *II* held that Washington law cannot apply to  
 5 the arbitration provision in the pre-2019 TOS versions, Delaware is left as the state with the most  
 6 significant relationship to those contractual provisions because it is where one of the contracting  
 7 parties (Amazon) is incorporated. See *Restatement* § 188(2)(e) (considering, among other things,  
 8 a party's "place of incorporation"). If Washington law cannot apply, Delaware law must.

9 For all these Arbitration Plaintiffs, the agreements are enforceable under the laws of the  
 10 states with the most significant relationship to the contracts. For the contracts to which Delaware  
 11 has the most significant relationship, Delaware law, as explained already, requires enforcement of  
 12 the arbitration agreements. See *supra* Section III.C.1. And as discussed next, for the contracts to  
 13 which the states where Plaintiffs signed up to work have the most significant relationship, those  
 14 states also require enforcement of the arbitration agreements. So the Arbitration Plaintiffs who did  
 15 not accept post-2019 versions of the TOS must still arbitrate under these state laws. And if, for  
 16 whatever reason, the post-2019 selection of Delaware law were ineffective of its own force under  
 17 *Restatement* Section 187, the parties bound by the post-2019 TOS would also have to arbitrate  
 18 under these alternative state laws under *Restatement* Section 188. These states have arbitration  
 19 statutes and pro-arbitration policies that resemble the FAA. Indeed, for the vast majority of these  
 20 states, courts have already used their state arbitration laws to enforce FAA-exempt arbitration  
 21 agreements.

22 **Arizona.** Two Arbitration Plaintiffs signed up to perform services in Arizona. Wilson Decl.  
 23 Appx. B. Much like the FAA, Arizona's Revised Uniform Arbitration Act directs that "[a]n  
 24 agreement contained in a record to submit to arbitration any existing or subsequent controversy  
 25 arising between the parties to the agreement is valid, enforceable and irrevocable except on a  
 26 ground that exists at law or in equity for the revocation of a contract." ARIZ. REV. STAT. ANN. § 12-



3006(A); *see also id.* § 12-1501. The state’s “arbitration statutes . . . express Arizona’s public policy that arbitration is a highly desirable method of resolving disputes.” *Pima County ex rel. City of Tucson v. Maya Constr. Co.*, 761 P.2d 1055, 1058 (Ariz. 1988).

**California.** Fifty-four Arbitration Plaintiffs signed up to perform services in California. Wilson Decl. Appx. B. Like the FAA, the California Arbitration Act states that “[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.” CAL. CIV. PROC. CODE § 1281. “Through this detailed statutory scheme, the Legislature has expressed a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.” *Vandenberg v. Superior Ct.*, 982 P.2d 229, 238 (Cal. 1999) (citation omitted). An FAA-exempt agreement is enforceable under California law. *See Maldonado v. Sys. Servs. of Am., Inc.*, No. SACV09542JVSРNBX, 2009 WL 10675793, at \*2 (C.D. Cal. June 18, 2009).

**Colorado.** Three Arbitration Plaintiffs signed up to perform services in Colorado. Wilson Decl. Appx. B. Like the FAA, the Colorado Uniform Arbitration Act states that “[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.” COLO. REV. STAT. § 13-22-206(1). “Colorado law favors the resolution of disputes through arbitration.” *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126, 128 (Colo. 2007).

**District of Columbia.** One Arbitration Plaintiff signed up to perform services in the District of Columbia. Wilson Decl. Appx. B. Like the FAA, the D.C. Revised Uniform Arbitration Act states, “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” D.C. CODE § 16-4406(a). And “[j]ust as ‘Congress [has] declared a national policy favoring arbitration,’ so



has the District of Columbia.” *D.C. Pub. Emp. Rels. Bd. v. Fraternal Ord. of Police*, 987 A.2d 1205, 1209 (D.C. 2010) (citation omitted).

**Florida.** One Arbitration Plaintiff signed up to perform services in Florida. Wilson Decl. Appx. B. “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” FLA. STAT. § 682.02(1). “Florida public policy favors arbitration.” *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 472 (Fla. 2011). An FAA-exempt agreement is enforceable under Florida law. *See Powell v. Carey Int’l, Inc.*, No. 05-21395-CIV, 2006 WL 8434352, at \*6 (S.D. Fla. Nov. 17, 2006); *Guidice v. Sage Corp.*, No. 06-80659-CIV, 2006 WL 8433427, at \*2 (S.D. Fla. Nov. 6, 2006).

**Illinois.** Two Arbitration Plaintiffs signed up to perform services in Illinois. Wilson Decl. Appx. B. Like the FAA, the Illinois Uniform Arbitration Act states, “A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract.” 710 ILL. COMP. STAT. ANN. 5/1. “[P]ublic policy in Illinois favors arbitration.” *Phoenix Ins. Co. v. Rosen*, 949 N.E.2d 639, 647 (Ill. 2011). An FAA-exempt agreement is enforceable under Illinois law. *See, e.g., Atwood*, 2016 WL 2766656, at \*3-4.

**Massachusetts.** One Arbitration Plaintiff signed up to perform services in Massachusetts. Wilson Decl. Appx. B. Like the FAA, the Massachusetts Uniform Arbitration Act states, “A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.” MASS. GEN. LAWS ch. 251, § 1. “Similar to the Federal Act, the Massachusetts Act ‘express[es] a strong public policy favoring arbitration.’” *St. Fleur v. WPI Cable Sys./Mutron*, 879 N.E.2d 27, 31 (Mass. 2008) (citation omitted).

1       **Minnesota.** Two Arbitration Plaintiffs signed up to perform services in Minnesota. Wilson  
 2 Decl. Appx. B. Like the FAA, the Minnesota Revised Uniform Arbitration Act states, “An  
 3 agreement contained in a record to submit to arbitration any existing or subsequent controversy  
 4 arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a  
 5 ground that exists at law or in equity for the revocation of contract.” MINN. STAT. § 572B.06(a).  
 6 “The public policy of [Minnesota] favoring the employment of arbitration is clearly and firmly  
 7 established in [Minnesota] law.” *Schmidt v. Midwest Fam. Mut. Ins. Co.*, 426 N.W.2d 870, 875  
 8 (Minn. 1988). An FAA-exempt agreement is enforceable under Minnesota law. *E.g., Butler v. ATS*  
 9 *Inc.*, No. 20-CV-1631 (PJS/LIB), 2021 WL 1382378, at \*26 (D. Minn. Apr. 13, 2021).

10       **New Jersey.** Two Arbitration Plaintiffs signed up to perform services in New Jersey.  
 11 Wilson Decl. Appx. B. Like the FAA, the New Jersey Arbitration Act states, “An agreement  
 12 contained in a record to submit to arbitration any existing or subsequent controversy arising  
 13 between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground  
 14 that exists at law or in equity for the revocation of a contract.” N.J. STAT. ANN. § 2A:23B-6(a).  
 15 “[T]he affirmative policy of [New Jersey], both legislative and judicial, favors arbitration as a  
 16 mechanism of resolving disputes.” *Martindale v. Sandvik, Inc.*, 800 A.2d 872, 881 (N.J. 2002). An  
 17 FAA-exempt agreement is enforceable under New Jersey law. *See, e.g., Arafat*, 233 A.3d at 509;  
 18 *Siperavage v. Uber Techs., Inc.*, No. CV 20-12265, 2021 WL 2680060 (D.N.J. June 30, 2021).

19       **New York.** Two Arbitration Plaintiffs signed up to perform services in New York. Wilson  
 20 Decl. Appx. B. Like the FAA, the New York’s arbitration statute states, “A written agreement to  
 21 submit any controversy thereafter arising or any existing controversy to arbitration is enforceable  
 22 without regard to the justiciable character of the controversy and confers jurisdiction on the courts  
 23 of the state to enforce it and to enter judgment on an award.” N.Y. C.P.L.R. 7501. “[A]rbitration  
 24 is a favored method of dispute resolution in New York, and ‘New York courts interfere as little as  
 25 possible with the freedom of consenting parties to submit disputes to arbitration.’” *Bd. of Educ. of*  
 26 *Bloomfield Cent. Sch. Dist. v. Christa Constr., Inc.*, 608 N.E.2d 755 (N.Y. 1992) (citations

omitted). An FAA-exempt agreement is enforceable under New York law. *See, e.g., Islam*, 524 F. Supp. 3d at 360; *Castro v. TCA Logistics Corp.*, No. 20-CV-2004(JS)(ARL), 2021 WL 7287305, at \*8 (E.D.N.Y. Mar. 31, 2021); *Burgos v. Ne. Logistics, Inc.*, No. 15CV6840CBACLP, 2017 WL 10187756, at \*4 (E.D.N.Y. Mar. 30, 2017).

**North Carolina.** One Arbitration Plaintiff signed up to perform services in North Carolina. Wilson Decl. Appx. B. Like the FAA, the North Carolina Revised Uniform Arbitration Act states, “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract.” N.C. GEN. STAT. ANN. § 1-569.6. “North Carolina has a strong public policy favoring the settlement of disputes by arbitration.” *Johnston Cnty. v. R.N. Rouse & Co., Inc.*, 414 S.E.2d 30, 32 (N.C. 1992).

**Ohio.** Two Arbitration Plaintiffs signed up to perform services in Ohio. Wilson Decl. Appx. B. Like the FAA, the Ohio Arbitration Act states, “A provision in any written contract . . . to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract . . . shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.” OHIO REV. CODE ANN. § 2711.01(A). “Both the Ohio General Assembly and Ohio courts have expressed a strong public policy favoring arbitration.” *Hayes v. Oakridge Home*, 908 N.E.2d 408, 411 (Ohio 2009). An FAA-exempt agreement is enforceable under Ohio law. *See W.L. Byers Trucking, Inc. v. Falcon Transp. Co.*, No. 2:09CV342JVB, 2010 WL 3724895, at \*4 (N.D. Ind. Sept. 17, 2010).

**Oregon.** One Arbitration Plaintiff signed up to perform services in Oregon. Wilson Decl. Appx. B. Like the FAA, the Oregon Uniform Arbitration Act states, “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” OR. REV. STAT. § 36.620(1). “Oregon law and the FAA

1 favor arbitration as a means for resolving disputes.” *Motsinger v. Lithia Rose-FT, Inc.*, 156 P.3d  
2 156, 165 (Or. Ct. App. 2007).

3 **Pennsylvania.** One Arbitration Plaintiff signed up to perform services in Pennsylvania.  
4 Wilson Decl. Appx. B. Like the FAA, the Pennsylvania Uniform Arbitration Act states, “A written  
5 agreement to subject any existing controversy to arbitration or a provision in a written agreement  
6 to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable  
7 and irrevocable, save upon such grounds as exist at law or in equity relating to the validity,  
8 enforceability or revocation of any contract.” 42 PA. CONS. STAT. § 7303. “[T]he settlement of  
9 disputes by arbitration is favored by the public policy of [Pennsylvania] and is, therefore,  
10 encouraged by [Pennsylvania] courts and by statute.” *Fastuca v. L.W. Molnar & Assocs.*, 10 A.3d  
11 1230, 1245 (Pa. 2011). An FAA-exempt agreement is enforceable under Pennsylvania law. *See,*  
12 *e.g., Nelson*, 2021 WL 4262325, at \*7; *Adams v. Parts Distribution Xpress, Inc.*, No. 2:20-CV-  
13 00697-JMG, 2021 WL 1088231, at \*5 (E.D. Pa. Mar. 22, 2021).

14 **Tennessee.** One Arbitration Plaintiff signed up to perform services in Tennessee. Wilson  
15 Decl. Appx. B. Like the FAA, the Tennessee Uniform Arbitration Act states, “A written agreement  
16 to submit any existing controversy to arbitration or a provision in a written contract to submit to  
17 arbitration any controversy thereafter arising between the parties is valid, enforceable and  
18 irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract.”  
19 TENN. CODE ANN. § 29-5-302(a). “[A]rbitration agreements in contracts are favored in Tennessee  
20 both by statute and existing case law.” *Benton v. Vanderbilt Univ.*, 137 S.W.3d 614, 617 (Tenn.  
21 2004). An FAA-exempt agreement is enforceable under Tennessee law. *See, e.g., Green v. U.S.*  
22 *Xpress Enters., Inc.*, 434 F. Supp. 3d 633, 644 (E.D. Tenn. 2020).

23 **Texas.** Eight Arbitration Plaintiffs signed up to perform services in Texas. Wilson Decl.  
24 Appx. B. Like the FAA, the Texas Arbitration Act states that written arbitration agreements are  
25 generally valid and enforceable and are revocable “only on a ground that exists at law or in equity  
26 for the revocation of a contract.” TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a). “Texas law

strongly favor[s] arbitration.” *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex. 2008). An FAA-exempt agreement is enforceable under Texas law. *See, e.g., Davis v. EGL Eagle Glob. Logistics L.P.*, 243 F. App’x 39, 44 (5th Cir. 2007); *Shanks v. Swift Transp. Co. Inc.*, No. CIV.A. L-07-55, 2008 WL 2513056, at \*12 (S.D. Tex. June 19, 2008).

**Utah.** Two Arbitration Plaintiffs signed up to perform services in Utah. Wilson Decl. Appx. B. Like the FAA, the Utah Uniform Arbitration Act states, “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” UTAH CODE ANN. § 78B-11-107(1). “It is the policy of the law in Utah to interpret contracts in favor of arbitration.” *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 40 P.3d 599, 606 (Utah 2002). An FAA-exempt agreement is enforceable under Utah law. *See, e.g., Abram*, 2020 WL 5077373, at \*7; *Roberts v. Cent. Refrigerated Serv.*, 27 F. Supp. 3d 1256, 1263 (D. Utah 2014).

#### IV. CONCLUSION

For all these reasons, the Court should compel the Arbitration Plaintiffs to arbitrate under federal and/or state law and either stay litigation of their claims pending arbitration or dismiss those claims from this action.

Dated: December 19, 2022

Respectfully submitted,

By: s/ Richard G. Rosenblatt

Richard G. Rosenblatt (*pro hac vice*)  
James P. Walsh, Jr. (*pro hac vice*)  
MORGAN, LEWIS & BOCKIUS LLP  
502 Carnegie Center  
Princeton, NJ 08540-6241  
Telephone: (609) 916-6600  
Facsimile: (609) 916-6601  
richard.rosenblatt@morganlewis.com  
james.walsh@morganlewis.com

By: s/ Andrew DeCarlow

Andrew DeCarlow, WSBA No. 54471  
MORGAN, LEWIS & BOCKIUS LLP

1301 Second Avenue, Suite 2800  
Seattle, WA 98101  
Telephone: (206) 274-0154  
Facsimile: (206) 274-6401  
andrew.decarlow@morganlewis.com

Brian D. Berry (*pro hac vice*)  
Andrea L. Fellion (*pro hac vice*)  
Sarah Zenewicz (*pro hac vice*)  
MORGAN, LEWIS & BOCKIUS LLP  
One Market Spear Street Tower  
San Francisco, CA 94105  
Telephone: (415) 442-1000  
Fax: (415) 442-1001  
brian.berry@morganlewis.com  
andrea.fellion@morganlewis.com  
sarah.zenewicz@morganlewis.com

John S. Battenfeld (*pro hac vice*)  
Max C. Fischer (*pro hac vice*)  
Brian D. Fahy (*pro hac vice*)  
MORGAN, LEWIS & BOCKIUS LLP  
300 S. Grand Ave., Suite 2200  
Los Angeles, CA 90071  
Telephone: (213) 612-2500  
Fax: (213) 612-2501  
jbattenfeld@morganlewis.com  
max.fischer@morganlewis.com  
brian.fahy@morganlewis.com

By: s/ Todd L. Nunn

Todd L. Nunn, WSBA #23267  
K&L GATES LLP  
925 Fourth Ave, Suite 2900  
Seattle, WA 98104-1158  
Telephone: (206) 623-7580  
Facsimile: (206) 623-7022  
todd.nunn@klgates.com

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 19, 2022, I caused to be electronically filed the foregoing **DEFENDANTS' RENEWED MOTION TO COMPEL ARBITRATION** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the registered attorneys of record.

By: s/ Andrew DeCarlow  
Andrew DeCarlow, WSBA No. 54471  
MORGAN, LEWIS & BOCKIUS LLP  
1301 Second Avenue, Suite 2800  
Seattle, WA 98101  
Telephone: (206) 274-0154  
Facsimile: (206) 274-6401  
andrew.decarlow@morganlewis.com

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

DEFENDANTS' RENEWED MOT. TO COMPEL ARBITRATION  
Case No. C16-1554 JCC - 1

MORGAN, LEWIS & BOCKIUS LLP  
Attorneys at Law  
1301 Second Ave., Ste. 2800  
Seattle, WA 98101  
Telephone: +1-206-274-6400  
Facsimile: +1-206-274-6401